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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted].114

JAMES C. DAVIS, AS AGENT, ETC., PETITIONER,

vs.

THE PORTLAND SEED COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1922.

CERTIORARI AND RETURN FILED DECEMBER 20, 1922.

(29,123)

(29,123)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 573.

JAMES C. DAVIS, AS AGENT, ETC., PETITIONER,

vs.

THE PORTLAND SEED COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 IN THE

United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), Plaintiff in Error,

vs.

PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

Names and Addresses of the Attorneys of Record.

Arthur C. Spencer, Charles E. Cochran, and John F. Reilly, Wells Fargo Building, Portland, Oregon, for the Plaintiff in Error.
James G. Wilson and George B. Guthrie, Platt Building, Portland, Oregon, for the Defendant in Error.

Citation on Writ of Error.

[Filed Oct. 1, 1921.]

UNITED STATES OF AMERICA,
District of Oregon, ss:

To the Portland Seed Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of
2 Oregon, wherein James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Company), is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this first day of October, in the year of our Lord, one thousand nine hundred and twenty-one. R. S. Bean, Judge.

Due and legal service of the within citation is hereby admitted and acknowledged at Portland, Oregon, this 1st day of October, 1921. James G. Wilson, Attorney for Defendant in Error.

[File endorsement omitted.]

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Writ of Error.

(Filed Sept. 30, 1921.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The Portland Seed Company, a corporation, plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be herein given, that

4 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 30th day of September, 1921. G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, by F. L. Buck, Chief Deputy. [Seal.]

Service of the above Writ of Error made this 30th day of September, 1921, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error. G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, by F. L. Buck, Chief Deputy.

5 [File endorsement omitted.]

In the District Court of the United States for the District of Oregon.

November Term, 1920.

Be it remembered, That on the 20th day of December, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follow, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

6 **Complaint at Law.**

[Filed Dec. 20, 1920.]

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the plaintiff is now and during all of the times hereinafter complained of was a corporation duly organized and existing under and by virtue of the laws of the state of Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company is now, and during all of the times hereinafter complained of was, a railroad corporation duly organized and existing and owning, among other lines, a line of railroad extending from Huntington in the state of Oregon to Walla Walla and to Yakima in the state of Washington. That at Huntington, Oregon, the line of railroad of the Oregon-Washington Railroad & Navigation Company connects with the line of railroad of the Oregon Short Line Railroad Company, which extends from Granger, Wyoming, to Huntington. That the Union Pacific Railroad Company own the line of railroad, and at all times hereinafter complained of owned the line of railroad extending from Denver in the state of Colorado to Granger in the state of Wyoming, at which point it connects with said line of Oregon Short Line Railroad Company. That the Atchison, Topeka & Santa Fe Railway Company is and at all times hereinafter complained of was the owner of a line of railroad from Roswell, New Mexico, to Denver, in the state of Colorado, at which
7 point said line connects with the line of the said Union Pacific Railroad Company.

III.

That during all of the times hereinafter complained of, the United States Railroad Administration was in control of the said lines of

railroad of the Oregon-Washington Railroad & Navigation Company, the Oregon Short Line Railroad Company, the Union Pacific Railroad Company, and the Atchison, Topeka & Santa Fe Railway Company, and was operating the same as a common carrier in Interstate Commerce under the authority of the United States and the Director General of Railroads, and pursuant to its tariffs, rules, and regulations for said purpose adopted and provided. That pursuant to the Acts of Congress and his appointment by the President of the United States, defendant John Barton Payne is now the duly appointed, qualified, and acting agent of said United States Railroad Administration and authorized to represent it in the defense of this action.

IV.

That this is an action or proceeding arising under section 1 of the Act of Congress to regulate commerce as amended, which provides "that it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being in-
8 cluded within the longer distance," and is within the jurisdiction of this court.

V.

That heretofore and on or about the 19th day of December, 1918, there was delivered unto the United States Railroad Administration, by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Yakima, designated in the bill of lading as North Yakima, in the state of Washington, with directions to notify the Portland Seed Company at Yakima, designated in said bill of lading as North Yakima in the state of Washington, 345 bags of alfalfa seed weighing 60,281 pounds, and said Railroad Administration accepted the same from the said E. W. Mitchell and loaded the same in M. K. & T. car #87309 and issued therefor its certain order Bill of Lading, by the terms of which said Railroad Administration undertook, subject to the classifications and tariffs in effect on the date of the issue of said Bill of Lading, to transport to Yakima, Washington, and deliver on surrender of the said Bill of Lading and payment of its lawful charges accruing under the tariffs of said Railroad Administration in effect covering said transportation.

VI.

That said United States Railroad Administration transported said seed over the lines of the said Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Naviga-

tion Company, from Roswell, New Mexico, to Yakima, Wash-
9 ington, and there delivered the same to the plaintiff on sur-
render of the said original Bill of Lading, and collected therefor the sum of $1,720.35, including war tax, which said sum was paid at Yakima, Washington, by plaintiff on the 8th day of January, 1919.

VII.

That prior to the transportation of said shipment, the United States Railroad Administration had adopted a schedule of rates for the transportation of commodities, including alfalfa seed from points in Texas, including Pecos, Texas, to points in Washington, including Yakima, Washington, and had filed such schedule with the Interstate Commerce Commission and is contained in Transcontinental Freight Bureau, West Bound Tariff No. 4-0, I. C. C. No. 1049 of R. H. Countis, agent, and supplements thereto, including Supplement No. 4, which said original tariff was issued February 21, 1918, and became effective March 15, 1918, and which said supplement was issued March 15, 1918, and became effective April 30, 1918, and provides rates for the transportation of Alfalfa seed from Pecos, Texas, to Yakima, Washington, over the lines of railroad of the Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, together with the lines of other carriers on the route through Roswell, New Mexico, Denver, Colorado, Granger, Wyoming, Huntington, Oregon, thence to destination. That in and by said schedule of rates so
10 filed, the rate for the transportation of alfalfa seed from Pecos, Texas, to Yakima, Washington, was and is the sum of $1.21 per hundred pounds. That thereafter, the said Railroad Administration by General Order 28, issued May 25, 1918, made effective June 25, 1918, increased the rate on alfalfa seed between said points twenty-five (25) per cent, and said schedule of rates as so modified and increased was in full force and effect at all times subsequent thereto up to and subsequent to the delivery and transportation of said alfalfa seed as hereinabove alleged, and governed the rate applicable to said shipment.

VIII.

That Pecos, Texas, is a point on the line of the Panhandle & Santa Fe Railway Company and part of the Atchison, Topeka & Santa Fe lines and is on the line of said companies leading south from Clovis, New Mexico, into Texas, and is a more distant point from Yakima, Washington, than is Roswell, New Mexico, and the said Roswell, New Mexico, is intermediate between Yakima, Washington, and Pecos, Texas.

IX.

That no application had been made by the Railroad Administration or by the carriers owning the lines between Pecos, Texas, and

Yakima, Washington, and Roswell, New Mexico, and Yakima, Washington, to the Interstate Commerce Commission for permission to charge less for shipments of alfalfa seed from Pecos, Texas, to Yakima, Washington, and no investigation or hearing has
11 been had on any such application and no permission or authority given by the Commission to charge less for shipments of alfalfa seed from Pecos, Texas, to Yakima, Washington, than from Roswell, New Mexico, to Yakima, Washington, and said United States Railroad Administration and said carriers owning the lines between Pecos, Texas, and Yakima, Washington, were at the time of the shipment hereinabove alleged prohibited from charging more for shipments of alfalfa seed from Roswell, New Mexico, to Yakima, Washington, than the rate adopted and in force for the transportation of Alfalfa seed from Pecos, Texas, to Yakima, Washington, the said transportation being over the same line or route in the same direction, the shorter distance being included within the longer. That the lawful charge so adopted by the United States Railroad Administration and in force at the time of the transportation of the Alfalfa seed hereinabove referred to and applicable to shipments from Pecos, Texas, to Yakima, Washington, on shipments of alfalfa seed of 60,300 pounds, including the war tax, is the sum of $940.95, and any charge in excess thereof for transportation of the shipment herein involved from Roswell, New Mexico, to Yakima, Washington, was illegal and exacted by the United States Railroad Administration without right or authority. That subsequent to the said charge of $1,720.35 for said transportation, said Railroad Administration has refunded to the plaintiff the sum of $408.31 and no more, which said sum was paid to plaintiff on the 21st day of July, 1919.
12 X.

That the plaintiff by such unlawful exaction has been damaged in the sum of $371.09 and has been deprived of the use thereof since the date of such execution, to wit: the 8th day of January, 1919, and is entitled to recover the same with interest at the rate of six per cent (6%) per annum from the said 8th day of January, 1919.

For a second cause of action plaintiff alleges:

I.

Plaintiff repeats and incorporates herein as a part of this cause of action as if set out at large paragraphs 1, 2, 3, and 4 of plaintiff's first cause of action.

II.

That heretofore and on or about the 4th day of January, 1919, there was delivered unto the United States Railroad Administration by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Walla Walla, Washington, with directions to notify the Portland Seed Company at Walla, Walla, Washington,

196 bags of Alfalfa seed weighing 34,538 pounds, and said Railroad Administration accepted the same from the said E. W. Mitchell and loaded the same into M. K. & T. Car No. 93666 and issued therefor its certain order Bill of Lading, by the terms of which said Railroad Administration undertook, subject to the classifications and tariffs in effect on the date of the issue of said Bill of Lading, to transport said shipment to Walla Walla, Washington, and deliver the same on surrender of said Bill of Lading and payment of its law-
13 ful charges accruing under the tariff of said Railroad Administration in effect covering said transportation.

III.

That said United States Railroad Administration transported said seed over the lines of the said Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company by way of Denver, Granger, and Huntington from Roswell New Mexico, to Walla Walla, Washington, and there delivered the same to the plaintiff on surrender of said Bill of Lading and collected therefor the sum of $823.57, including war tax, which said sum was paid by the plaintiff to the United States Railroad Administration at Walla Walla, Washington, on the 24th day of January, 1919.

IV.

That prior to the transportation of said shipment, the United States Railroad Administration had adopted a schedule of rates for the transportation of commodities, including alfalfa seed, from points in Texas, including Pecos, Texas, to points in Washington, including Walla Walla, Washington, and had filed such schedule with the Interstate Commerce Commission, and which said schedule is contained in Transcontinental Freight Bureau, West Bound Tariff No. 40, I. C. C. No. 1049, of R. H. Countis, Agent, and supplements thereto, including Supplement No. 4, which said original tariff was issued February 21, 1918, and became effective March 15,
14 1918, and which said supplement was issued March 15, 1918, and became effective April 30, 1918, and provides rates for the tranportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, over the said lines of railroad of the Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation Company, together with the lines of other carriers, including the Panhandle & Santa Fe Railway Company on the route through Roswell, New Mexico, Denver, Colorado, Granger, Wyoming, Huntington, Oregon, thence to destination. That in and by said schedule of rates so filed and published, the rate for the transportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, was and is the sum of $1.21 per hundred pounds. That thereafter, the said Railroad Administration by General Order 28,

issued May 26, 1918, and made effective June 25, 1918, increased the rate on Alfalfa seed between said points twenty-five per cent (25%), and said schedule of rates as so modified and increased was in full force and effect at all times subsequent thereto and up to and subsequent to the delivery and transportation of said Alfalfa seed, as hereinbefore alleged, and governed the rate applicable to said shipment.

V.

That Pecos, Texas, is a point on the line of the Panhandle & Santa Fe Railway Company and part of the Atchison, Topeka & Santa Fe Lines, and is on the line of said companies leading south from Clovis, New Mexico, into Texas, and is a more distant point from Walla Walla, Washington, than is Roswell, New Mexico, and the said Roswell, New Mexico, is intermediate between Walla Walla, Washington, and Pecos, Texas, on the line over which said shipment moved and over which said rate applied, as hereinbefore alleged, from Pecos, Texas, to Walla Walla, Washington.

VI.

That no application had been made by the United States Railroad Administration or by the carriers owning the lines between Pecos, Texas, and Walla Walla, Washington, and Roswell, New Mexico, and Walla Walla, Washington, to the Interstate Commerce Commission for permission to charge less for shipments of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, and no investigation or hearing has been had on any such application and no permission or authority has been given by the Commission to charge less for shipments of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, than from Roswell, New Mexico, to Walla Walla, Washington, and said United States Railroad Administration and said carriers owning the lines between Pecos, Texas, and Walla Walla, Washington, were at the time of the shipment hereinabove alleged, prohibited from charging more for shipments of Alfalfa seed from Roswell, New Mexico, to Walla Walla, Washington, than the rate adopted and in force for the transportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, the said transportation being over the same line or route in the same direction, the shorter distance being included within the longer, to which the said rate applies. That the lawful charge so adopted by the United States Administration and in force at the time of the transportation of the Alfalfa seed hereinbefore referred to and applicable to shipments from Pecos, Texas, to Walla Walla, Washington, on 34,538 pounds, the weight of the shipment, including the war tax, is the sum of $538.95, and any charge in excess thereof for transportation of the shipment herein involved, from Roswell, New Mexico, to Walla Walla, Washington, was illegal and exacted by the United States Railroad Administration without right or authority. That subsequent to said charge of $823.57 for said

transportation, said Railroad Administration has refunded to the plaintiff the sum of $106.75, together with 52¢ interest thereon and no more, which said sum was paid to plaintiff on the 24th day of January, 1919.

VII.

That plaintiff, by unlawful exaction, has been damaged in the sum of $177.87 and has been deprived of the use of said sum since the date of such exaction, to wit, the 24th day of January, 1919, and is entitled to recover the same from defendant with interest at the rate of six per cent (6%) per annum from the said 24th day of January, 1919.

Wherefore, plaintiff prays judgment against the defendant for the sum of $548.96, together with interest at the rate of 6% per annum on the sum of $371.09 from the 8th day of January, 1919, and together with interest on the sum of $177.87 at the rate of 6% per annum from the 24th day of January, 1919, together with plaintiff's costs and disbursements incurred herein. Wilson & Guthrie, Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah, ss:

I, E. C. Johnson, being first duly sworn, on my oath depose and say that I am President of the plaintiff, Portland Seed Company; that I have read the foregoing complaint, know the facts therein stated and that the same are true as I verily believe. F. C. Johnson, Pres.

Subscribed and sworn to before me this 18th day of December, 1920. F. W. Nelson, Notary Public for Oregon. [Seal.] My commission expires May 1, 1924.

[File endorsement omitted.]

And afterwards, to wit, on the 29th day of January 1921, there was duly filed in said Court, an answer, in words and figures as follows, to wit:

18 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Answer.

(Filed Jan. 29, 1921.)

Comes now the defendant and for answer to plaintiff's complaint herein, admits, denies, and alleges as follows, to wit:

I.

Admits the allegations contained in paragraphs I, II, and III of the Complaint.

II.

Denies each and every allegation contained in paragraph IV of the complaint, except that it is admitted that section 4 of the Act to Regulate Commerce, as amended, provides that it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

19 III.

Denies each and every allegation contained in paragraph V of the complaint, except that it is admitted that on or about the 19th day of December, 1918, E. W. Mitchell delivered to the United States Railroad Administration, at Roswell, New Mexico, a shipment said to be and contain three hundred forty-five bags of alfalfa seed, weighing 60,281 pounds, and same was loaded into MK&T car 87309, and consigned to the order of E. W. Mitchell at Yakima, Washington. Admits that the United States Railroad Administration undertook to transport said shipment subject to the classifications and tariffs in effect on the date of the issuance of the bill of lading covering said shipment.

IV.

Admits the allegations contained in paragraph VI of the complaint.

V.

Denies the allegations contained in paragraph VII of the complaint and the whole thereof, except that it is admitted that the United States Railroad Administration had duly filed and published with the Interstate Commerce Commission, as required by law, trans-

Continental Freight Bureau West-Bound tariff 4-0, I. C. C. No. 1049, of H. H. Countiss, Agent, and supplements thereto, including Supplement No. 4. Admits that said tariff was issued February 21, 1918, and became effective March 15, 1918. Admits that said supplement was issued March 15, 1918, and became effective
20 April 30, 1918, and except it is admitted that said tariffs provided rates for the transportation of alfalfa seed from Pecos, Texas, to Yakima, Washington, over the lines of railroad of the A. T. & S. F. Railway Company, U. P. Railroad Company, O. S. L. R. R., and O.-W. R. & N. Company. Admits that the rates on alfalfa seed from Pecos, Texas, to Yakima, Washington, were the rates named in said tariffs, as increased by General Order No. 28, effective June 25, 1918.

VI.

Admits the allegations contained in paragraph VIII of the complaint.

VII.

Denies each and every allegation contained in paragraph IX of the complaint, except that it is admitted that the United States Railroad Administration has refunded to the plaintiff the sum of $408.31, on account of said shipment, and admits that said refund was made on or about the 21st day of July, 1919.

VIII.

Denies each and every allegation contained in paragraph X of the complaint, and the whole thereof.

And for answer to plaintiff's second cause of action set forth in said complaint, the defendant admits, denies, and alleges as follows, to wit:

I.

Answering paragraph I of the second cause of action, defendant hereby repeats and incorporates herein all of the admissions
21 and denials contained in paragraphs I and II of defendant's answer to the first cause of action.

II.

Admits the allegations contained in paragraphs II and III of the second cause of action.

III.

Denies each and every allegation contained in paragraph IV of the second cause of action, and the whole thereof, except that it is admitted that Trans-Continental Freight Bureau West-Bound Tariff

4-0 I. C. C. 1049, of R. H. Countiss, Agent, and supplements thereto, including Supplement #4, were duly published and filed with the Interstate Commerce Commission, as required by law, and said original tariff became effective March 15, 1918, and said supplement became effective April 30, 1918. Admits that said tariffs provided rates for transportation of alfalfa seed from Pecos, Texas, to Walla Walla, Washington, over the lines of railroad of the A. T. & S. — Ry. Company, U. P. Ry., O. S. L. R. R., and O.-W. R. & N. Co. Admits that the rate on alfalfa seed from Pecos, Texas, to Walla Walla, Washington, is shown in said tariffs, and that said rates were increased by the United States Railroad Administration by General Order No. 28, effective June 25, 1918.

IV.

Admits the allegation contained in paragraph V of the second cause of action.

V.

Denies each and every allegation contained in paragraph
22 VI of the second cause of action, except that it is admitted that subsequent to the payment of the charges on said shipment, United States Railroad Administration refunded to the plaintiff the sum of $107.27. Admits that said refund was paid on the 24th day of December, 1919.

VI.

Denies each and every allegation contained in paragraph VII of the second cause of action, and the whole thereof.

Wherefore, having fully answered plaintiff's complaint herein, this defendant prays that this action be dismissed, and it have and recover its costs and disbursements herein. John F. Finerty, A. C. Spencer, W. A. Robbins, Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, ss:

I, W. A. Robbins, being first duly sworn, depose and say: That I am one of the attorneys for the defendant in the above-entitled case, and that I am authorized to make this verification for and on behalf of said defendant for the reason that said defendant is not within Multnomah county, Oregon, and capable of making this affidavit; that I have read the foregoing answer, know the contents thereof, and the same is in all respects true, as I verily believe. W. A. Robbins.

23 Subscribed and sworn to before me this 28th day of January, A. D. 1921. F. J. Betz, Notary Public for Oregon. [Seal.] My commission expires February 1. 1924.

Service by copy admitted at Portland, Oregon, January 29, 1920. James G. Wilson, Solicitor for plaintiff.

[File endorsement omitted.]

And afterwards, to wit, on the 8th day of March 1921, there was duly filed in said Court, a demurrer to the complaint in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Demurrer.

[Filed Mar. 8, 1921.]

Comes now the above-named defendant, and demurs to the complaint on file herein on the ground

24 I.

That the Court has no jurisdiction of the subject matter of the action.

Defendant will rely, in presenting this demurrer, on the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of controversies of this character. A. C. Spencer, W. A. Robbins, Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, ss:

I, W. A. Robbins, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law. W. A. Robbins.

Service by copy admitted at Portland, Oregon, March 8, 1921. James G. Wilson, Solicitor for Plaintiff.

[File endorsement omitted.]

And afterwards, to wit, on the 10th day of March 1921, there was duly filed in said Court, a stipulation to withdraw answer and to substitute demurrer to complaint, in words and figures as follows, to wit:

25 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation to Withdraw Answer and to Substitute Demurrer to Complaint.

[Filed Mar. 10, 1921.]

It is hereby stipulated and agreed, by and between Jas. G. Wilson, one of the attorneys for the plaintiff, and W. A. Robbins, one of the attorneys for the defendant, that the defendant may withdraw from the files in the above-entitled court and cause, the Answer to said complaint heretofore filed by the defendant, and substitute in lieu thereof defendant's demurrer to said complaint. James G. Wilson, of Attorneys for Plaintiff. W. A. Robbins, Attorney for Defendant.

[File endorsement omitted.]

26 And afterwards, to wit on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the Regular March term of said court. Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order Overruling Demurrer to Complaint.

[Filed Apr. 4, 1921.]

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the court being fully advised in the premises:

It is ordered that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer

27 Done and dated in open court this 4th day of April, 1921.

And afterwards, to wit, on the 4th day of April 1921, there was duly filed in said Court, an opinion on the demurrer to complaint, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

L–8748.

A. J. Parrington, Plaintiff,

vs.

San Francisco and Portland Steamship Company, a Corporation, Defendant.

L–8747.

A. J. Parrington, Plaintiff,

vs.

John Barton Payne, Agent United States Railroad Administration (San Francisco & Portland Steamship Company), Defendant.

28

L–8723.

The Portland Seed Company, a Corporation, Plaintiff,

vs.

John Barton Payne, Agent United States Railroad Administration (Oregon-Washington Railroad & Navigation Company), Defendants.

Memorandum Opinion on Demurrer to Complaint.

[Filed Apr. 4, 1921.]

Portland, Oregon, April 4, 1921.

Memorandum by Bean, District Judge.

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland, and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points.

The third case is a similar action against the Director General of Railroads, covering a shipment of alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

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The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportation to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the court is without jurisdiction of the subject matter because exclusively original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of
30 like kind of property for a shorter than a longer distance over the same line or route, in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeals in S. P. v. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: one where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction. (Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. v. U. S., 215 U. S. 481; Robinson v. B. & O., 222 U. S. 506; Mitchell Coal v. Penn. R. R., 230 U. S. 247; Morrisdale Coal v. Penn. R. R., 230 U. S. 304; Tex. & Pac. v. American Tie Co., 234 U. S. 138; N. P. v. Solum, 247 U. S. 477.) The other where the act complained of is directly prohibited by statute. In such the injured party may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. v. International Coal, 230 U. S. 184; Penn. R. R. v. Puritan Coal, 237 U. S. 121; Penn. R. R. v. Sonmer, 242 U. S. 120.)

As the long and short haul clause of the Interstate Com-
31 merce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured

party may in my judgment sue without first applying to the Commission for relief.

(2) The Shipments involved in two of the cases were by water from San Francisco to Portland and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier, by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension the rates, sched-
32 ules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.-W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions.

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the court in Phillips v. Grand Trunk (236 U. S. 662) which lends support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. *f*, 41 Stat. at L. 462) declared that "the period of
33 federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin, in Wenatchee Produce Co. v. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except in so far as may be inconsistent with the provisions of the act or any other act applicable to federal control or with any order of the President.

It would seem therefore that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transpor-
34 tation Act, all claims for damages by reason of the collection or enforcement by or through the president during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv. *a*, of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control.

As the present actions could have been *maintain* this court
35 against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208-*a* of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates in-

volved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

[File endorsement omitted.]

And afterwards, to wit, on the 26th day of April, 1921, there was duly filed in said Court, a stipulation to substitute James C. Davis, as Agent of the United States Railroad Administration as defendant, in words and figures as follows, to wit:

36 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation to Substitute James C. Davis, Agent, United States Railroad Administration, as Defendant.

(Filed Apr. 26, 1921.)

It is hereby stipulated by and between the parties hereto by their respective attorneys that James C. Davis as agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) be substituted in place of John Barton Payne, Agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), due to the appointment of said James C. Davis in place of said John Barton Payne as such agent. James G. Wilson, of Attorneys for Plaintiff. John F. Reilly, Attorneys for Defendant.

[File endorsement omitted.]

37 And afterwards, to wit, on Wednesday, the 26th day of April, 1921, the same being the 44th judicial day of the Regular March term of said Court. Present: The Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order Substituting James C. Davis, Agent, as Defendant.

(Filed Apr. 26, 1921.)

Based upon stipulation of the parties, it is hereby ordered that James C. Davis as agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) be and is hereby substituted as defendant for John Barton Payne, Agent of

the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines).

38 Done and dated in open court this 26th day of April, 1921. Chas. E. Wolverton, Judge.

[File endorsement omitted.]

And afterwards, to wit on the 31st day of May, 1921, there was duly filed in said Court, findings of fact and conclusions of law, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

No. L-8723.

[Title omitted.]

Findings of Fact and Conclusions of Law.

(Filed May 31, 1921.)

This matter coming on for trial on the 31st day of May, 1921, the plaintiff appearing by James G. Wilson, its attorney, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been submitted, the Court being fully advised does make the following

39 *Findings of Fact.*

I.

On the 19th day of December, 1918, there was delivered to the United States Railroad Administration by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell at Yakima, Washington, with directions to notify the Portland Seed Company at Yakima, three hundred forty-five (345) bags of alfalfa seed weighing 60,281 pounds, and said Railroad Administration accepted and transported the same over the line of the A. T. & S. F. Railroad Company to Denver, Colorado, thence via the U. P. Railroad Company's line to Granger, Wyoming, thence via the O. S. L. Railroad Company's line to Huntington, Oregon, thence via the O. W. R. & N. Company to Yakima, Washington, and delivered the same to the Portland Seed Company upon surrender of the bill of lading endorsed by E. W. Mitchell, and collected therefor the sum of Seventeen Hundred Twenty and 35/100 Dollars ($1,720.35), including war tax; that said property was the property of the Portland Seed Company, plaintiff herein, and said freight charges were paid by the Portland Seed Company, and that no part of said freight charges have been refunded to the plaintiff except the sum of Four Hundred Eight and 31/100 ($408.31) Dollars.

II.

That there was delivered to the United States Railroad Administration on January 4, 1919, by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Walla Walla, Washington, with directions to notify the Portland Seed Company at Walla Walla, one hundred ninety-six (196) bags of alfalfa seed weighing 34,538 pounds, which said shipment was accepted and transported by the Railroad Administration from Roswell, New Mexico, to Walla Walla, Washington, over the line of the A. T. & S. F. Railroad Company to Denver, Colorado, thence via the line of the U. P. Railroad Company to Granger, Wyoming, thence via the line of the O. S. L. Railroad Company to Huntington, Oregon, thence via the line of the O.-W. R. & N. to Walla Walla, Washington, and delivered the same to the Portland Seed Company upon surrender of the bill of lading endorsed by E. W. Mitchell, and collected as freight charges thereon the sum of Eight Hundred Twenty-three and 57/100 Dollars ($823.57), including war tax, which said sum was paid by the Portland Seed Company, plaintiff herein, and that no part of the said freight charges have been refunded except the sum of One Hundred Six and 75/100 Dollars ($106.75); and that said alfalfa seed was the property of the Portland Seed Company.

III.

That at the time of said shipments designated in paragraphs I and II above, there was established and in effect over the lines designated above from Pecos, Texas, to Walla Walla and Yakima, Washington, a rate of one and 51½/100 dollars ($1.51½) per cwt.

IV.

That Pecos, Texas, is a point more distant from Walla Walla, and Yakima, Washington, over the route on which said shipments moved than Roswell, New Mexico; that the said Railroad Administration had not secured any permission from the Interstate Commerce Commission to charge a higher rate for transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, than from Pecos, Texas, over said route.

V.

That the only lawful charge established for the transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, over said route was at the time of said shipment the rate in effect from Pecos, Texas, to the same points, and the charge for the shipment to Yakima including war tax should not have exceeded the sum of Nine Hundred Forty & 66/100 ($940.66) Dollars, and the charge on the shipment to Walla Walla

should not have exceeded the sum of Five Hundred Thirty-seven & 92/100 ($537.92); that the plaintiff was overcharged on said shipment to Yakima, Washington, no part of which has been refunded, the sum of Three Hundred Seventy-one & 9/100 ($371.09) Dollars, and on the shipment to Walla Walla, Washington, the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars, no part of which has been refunded; that the plaintiff has been damaged by the exaction of said rates in the sum of Three Hundred Seventy-one & 9/100 ($371.09) Dollars on the shipment to Yakima,
42 and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, that the freight charges on the first shipment were paid on the 8th day of January, 1919, and on the second shipment on the 24th day of January, 1919.

VI.

That a reasonable attorney's fees for the collection of said overcharge is the sum of One Hundred Seventy-five ($175.00) Dollars, which the court taxes and allows to plaintiff as a part of the costs herein.

Conclusions of Law.

Based upon the foregoing findings of fact, the Court finds as conclusion of law that the Railroad Administration exacted from the plaintiff for charges on the shipment to Yakima, Washington, illegally the sum of $371.09, and on the shipment to Walla Walla, Washington, illegally the sum of $177.87, and the plaintiff is entitled to recover the same with interest at the rate of six per cent per annum from the date of payment thereof, together with the sum of $175.00 as attorney's fees which the court taxes and allows to plaintiff as costs herein, and further costs and disbursements incurred by the plaintiff to be taxed.

Done and dated in open court this 31st day of May, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

43 Service by copy admitted at Portland, Oregon, June 1, 1921. C. E. Cochran, Attorney for Defendant.

And afterwards, to wit on Tuesday, the 31st day of May, 1921, the same being the 74th Judicial day of the Regular March Term of said Court. Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Judgment.

[Filed May 31, 1921.]

This matter coming on for trial on the 31st day of May, 1921, the plaintiff appearing by James G. Wilson, its attorney, and the defendant appearing by Charles E. Cochran, his attorney,
44 evidence having been submitted, the Court having signed and filed its findings of fact and conclusions of law on said evidence, which said findings of fact and conclusions of law are in favor of the plaintiff and against the defendant, the said trial being had before the court without a jury, based on said findings of fact and conclusions of law,

It is ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of Five Hundred Forty-eight & 96/100 ($548.96) Dollars, together with interest at the rate of six per cent per annum on the sum of $371.09 from January 8, 1919, and with interest on the sum of $177.87 at the rate of six per cent per annum from the 24th day of January, 1919, and the further sum of $175.00 as attorney's fees, together with the further costs and disbursements of plaintiff taxed and allowed in the sum of Fifteen 96/100 —; and it is further adjudged that the defendant pay said sums promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 31st day of May, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

Service by copy admitted at Portland, Oregon, June 1, 1921. C. E. Cochran, Attorney for Defendant.

45 And afterwards, to wit, on the 2d day of June 1921, there was duly filed in said Court, objections to findings of fact and conclusions of law, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Objections to Findings of Fact and Conclusions of Law.

[Filed June 2, 1921.]

Defendant, by Charles E. Cochran one of his attorneys, objects to the Findings of Fact and Conclusions of Law requested by the plaintiff, that is to say:

Defendant's Objections.

I.

Defendant objects to proposed findings of fact No. III in respect to the rate on the shipments referred to in paragraph- I and II of the proposed finding of fact from Pecos, Texas to Walla Walla and Yakima, Washington, respectively, of One & 51½/100 ($1.51½) Dollars per cwt. alleging said finding to be immaterial to the proper issues in this case.

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II.

Defendant objects to proposed finding of fact No. IV in effect reciting that Pecos, Texas, is a point more distant from Walla Walla and Yakima, respectively, over the route on which shipments moved than Roswell, New Mexico, alleging said finding to be immaterial to the proper consideration of this case.

III.

Defendant objects to proposed finding of fact No. V in effect reciting that the rate upon said shipment from Roswell, New Mexico, to Yakima, Washington, should not have exceeded Nine Hundred Forty & 66/100 ($940.66) Dollars, including war tax, and on the shipment to Walla Walla, Washington, should not have exceeded Five Hundred Thirty-seven & 92/100 ($537.92) Dollars, including war tax and also finding that plaintiff was overcharged the sum of Three Hundred Seventy-one & 09/100 ($371.09) Dollars on the shipment to Yakima and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, Washington, and alleges said finding to be immaterial and not in accordance with the lawful published and established rate on Alfalfa Seed from Roswell, New Mexico to Walla Walla and Yakima, respectively, which said rate is the sum of Two & 44/100 ($2.44) Dollars per cwt. including war tax.

IV.

Defendant objects to finding of fact No. VI and alleges that since the plaintiff has not been overcharged, attorney's fees can not legally be allowed.

47

V.

Defendant objects to conclusions of law proposed by plaintiff, and alleges such conclusions are not properly drawn from the foregoing facts, but requests the Court to find that the proper freight charges upon said shipments respectively, were the sum of Thirteen Hundred Twelve & 04/100 ($1,312.04) Dollars, on the shipment to Yakima, Washington, and the sum of Seventeen Hundred Sixteen and 62/100 ($1,716.62) Dollars on the shipment to Walla Walla, Washington, said sums being the amounts exacted from the plaintiff on account of the movement of said shipments.

VI.

Defendant further objects to the allowance of any interest to the plaintiff, either at six (6%) per cent, or any other rate per annum, from the date said freight charges were paid, even though it may be ultimately decided that plaintiff is entitled to judgment for the principal amounts prayed for.

VII.

Defendant also requests the Court a judgment in his favor and against the plaintiff for his costs and disbursements in this behalf expended. A. C. Spencer, Jno. F. Reilly, C. E. Cochran, Attorneys for Defendant.

[Filed endorsement omitted.]

Overruled June 2, 1921. R. S. Bean, Judge.

48 Service by copy admitted at Portland, Oregon, June 2, 1921. James G. Wilson, Solicitor for Plaintiff.

And afterwards, to wit, on the 20th day of July, 1921, there was duly filed in said Court, a bill of exceptions, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Bill of Exceptions.

[Filed July 20, 1921.]

Be it remembered, That on the 31st day of May, 1921, at Portland, Oregon, the above-entitled action regularly came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E.

49 Cochran, respectively, the attorneys. A jury having been waived said cause was tried to the Court.

Whereupon, the following proceedings were had:

Testimony of F. W. Nelson, for Plaintiff.

F. W. Nelson, called as a witness on behalf of plaintiff after being first duly sworn, testified as follows:

Direct examination.

(By Mr. Wilson:)

My name is F. W. Nelson, residence Portland, business traffic man for Portland Seed Company, plaintiff; am familiar with the records and movements of traffic of that company in December, 1918, and

Minnesota State Library
St. Paul, Minn.

January, 1919, including the two shipments of alfalfa seed consigned by E. W. Mitchell from Roswell, New Mexico; the one to North Yakima under bill of lading dated December 19, 1918, containing, according to the bill of lading 345 bags of alfalfa seed, and the other to Walla Walla under bill of lading dated January 4, 1919, purporting to cover 196 bags of alfalfa seed. These shipments consisted of alfalfa seed; the Portland Seed Company was the owner who paid the freight on both shipments.

Mr. Wilson: Copies of the bills of lading are offered in evidence, which I have agreed with Mr. Cochran are correct copies of the bills of lading.

Same are received and marked Plaintiff's Exhibit- 1 and 2 respectively, and are attached to this bill of exceptions and made a part hereof.

50 Mr. Cochran: I will agree that the documents, which have been marked Plaintiff's Exhibit- 1 and 2 respectively, are copies of the original bills of lading which are in the possession of the defendant here in Portland in its files; also that the bills were endorsed in blank by E. W. Mitchell and were surrendered on payment of the freight; and also were endorsed by the Portland Seed Company.

Mr. Wilson: I would like to ask counsel for the original expense bill which was turned in to the Director General at the time freight claims were filed.

Mr. Cochran: In response to counsel's demand, I produce Form 747, Union Pacific System form, in use by the Director General, being freight bill dated Yakima, Washington, January 8, 1919, E. W. Mitchell, consignee, Portland Seed Company notify party.

Mr. Wilson: I would like to offer the document in evidence.

Same was received, marked Plaintiff's Exhibit 3, and is physically attached to this bill of exceptions and made a part thereof.

Mr. Cochran: Also in response to counsel's demand, I produce form 746, freight bill in use by the United States Railroad Administration, dated January 24, 1919, in which Mr. E. W. Mitchell is consignee, and Portland Seed Company the notify party.

51 Same was received in evidence, marked Plaintiff's Exhibit 4, and is physically attached to this bill of exceptions and made a part hereof.

Testimony of A. J. Parrington, for Plaintiff.

A. J. PARRINGTON, called as a witness for plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Wilson:)

My name is A. J. Parrington; occupation traffic attorney, have been such for last 12 years; am familiar with the method of comparing and reading tariffs of railroad companies, including expense

bills. Plaintiff's Exhibit 3 which I have in my hand shows on its face that it is a freight bill of the United States Railroad Administration covering a carload shipment of alfalfa seed originally at Roswell, New Mexico; was routed by the Atchison, Topeka & Santa Fe Railroad Lines to Denver, Colo., and Union Pacific System to Yakima, Washington. Plaintiff's Exhibit 4, which I hold in my hand is a paid freight bill of the United States Railroad Administration, covering a carload shipment of alfalfa seed from Roswell, New Mexico, via the Atchison, Topeka & Santa Fe Railroad Lines to Denver, Colo., and Union Pacific System Lines to Walla Walla, Washington.

Q. Have you a map, Mr. Parrington, of the location of the originating point and also the destination points of these shipments?

A. I have a large wall map of the A. T. & S. F. Railway
52 System.

The witness under appropriate interrogations continued:

I have marked on this map the location of Roswell, New Mexico, with the letter "A"; the location of Pecos, Texas, with the letter "B"; the location of Yakima, Washington, with the letter "C," and of Walla Walla, Washington, with the letter "D." The map shows the entire route which the shipments took.

From Roswell, New Mexico, the shipments moved via Clovis; marked upon the map with the figure "1," the next junction point in the movement is Belen, New Mexico, which is marked on the Map with the figure "2"; thence to La Junta, and from La Junta to Denver, at Denver the connection is with the Union Pacific System to point of destination.

Map offered in evidence and received, marked Plaintiff's Exhibit 5, and is physically attached hereto and made a part of this Bill of Exceptions.

The witness continued:

I have a set of tariffs in effect governing the transportation of alfalfa seed from Pecos, Texas, in effect during December, 1918, and January, 1919. There are no through rates from Roswell to Walla Walla and Yakima, Washington, respectively.

Thereupon, by agreement, the witness read into the record the material parts of the railroad tariffs, and continued as follows:

53 This is a tariff of the United States Railroad Administration published by R. H. Countiss, Agent, and carries the I. C. C. No. 1049; the original tariff was dated March 15, 1918, and was continued in effect up to and following the date of the shipment of the two cars mentioned. The tariff is made up in geographical grouping method, and the State of Texas is carried in the list of points from which the rates named herein apply. Texas is shown as taking group H rates. Walla Walla is shown in the list of stations in Washington as taking rate basis 3, Commodity Rates, shown on page 84; Yakima is shown on page 87 as taking Rate Basis 2 Rates; item twenty-one sixty on page 246 of this tariff names rate on alfalfa seed in bags from group H to Rate Basis 2 and Rate Basis 3 of $1.21 per cwt.; that rate was increased by 25% under the authority of Director

General of Railroads, United States Railroad Administration, General Order No. 28, making a rate from Pecos, Texas, to Walla Walla and Yakima, Washington, of $1.51½.

I have now given all of the tariff references providing for the rate on alfalfa seed, carload lots from Pecos, Texas, to Yakima and Walla Walla, Washington.

Pecos, Texas, is located on the Panhandle & Santa Fe Branch of the Atchison, Topeka & Santa Fe Railroad Company's lines and is located directly south of Roswell, New Mexico; both are on the same route to Walla Walla and Yakima, Washington. Pecos,
54 Texas, is the more distant point, and Roswell, New Mexico, is intermediate between Pecos, Texas and WallaWalla and Yakima, Washington, on the line over which the shipments moved.

There is no way by which the shipments from Pecos, Tex., via the line of the A. T. & S. F. to Denver, and Union Pacific to Walla Walla and Yakima could move except through Roswell, New Mexico. The rate from Pecos, Texas, to Walla Walla and Yakima is $1.51½ per cwt. in carload lots. I have figured the freight using this rate on Plaintiff's Exhibit 3; the total charges would aggregate $913.25 freight charges and $27.41 war tax, a total of $940.66. The proper freight charges on plaintiff's Exhibit 4 would aggregate $522.25, war tax $15.67, making a total of $537.92. There is nothing contained in item 2160 on page 246 of the R. H. Countiss tariff, I. C. C. No. 1049, nor on the title page of said tariff which would indicate in any way that permission has been given by the I. C. C. to charge less for the longer haul from Pecos, Texas, to Walla Walla and Yakima, Washington, than from Roswell, New Mexico, to Walla Walla or Yakima, Washington.

Mr. Wilson: The reason I am offering is that there is a ruling of the Interstate Commerce Commission in regard to the formation of tariff that in case any permission of that kind is given it shall be noted on the title page, and we find no such notation, and I am offering that in support of my allegation that no permission has been applied for and none granted. In that connection I would
55 like to read into the record a part of Rule 77 of Tariff Circular 18-A issued by the Interstate Commerce Commission, which relates to the notation upon the title page of Tariff when any such permission is given, and same follows:

"When the commission has issued an order granting to a carrier permission to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distances over the same line or route, the title page of each tariff issued and filed under such authority must bear the following notation: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distances over the same route, such departure from the terms of the amended fourth section of the Act to regulate commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. —— of (date) of 19—.' When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of inter-

mediate rate or fares subject to the Act, the title page of each tariff issue and file under such authority must bear the following notation: "This tariff contains rates (or fares) that exceed the sums of the intermediate rates (or fares) subject to the Act. Such departure from
the terms of the amended fourth section of the Act to Regu-
56 late Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. — of (date) 19—. Nothing in this rule may be construed as waiving any of the provisions of amended fourth section of the Act to regulate Commerce."

Cross-examination.

(By Mr. Cochran:)

The witness testified as follows:

The rate in effect at the time the shipments moved from Roswell, New Mexico, to Walla Walla and Yakima, Washington, respectively, via the A. T. & S. Fe to Denver and Union Pacific System to Walla Walla and Yakima was $2.44 per hundred pounds carload lots on alfalfa seed in bags. Roswell, New Mexico, was not named in the groups from which through rates applied to New Mexico, so a combination of rates from Roswell to Denver and from Denver to Walla Walla and Yakima, Washington, in the sum of $2.44 per hundred pounds was the rate actually charged. The rate from Pecos, Texas, to Walla Walla and Yakima respectively, was $1.51½ per hundred pounds.

Testimony of James G. Wilson, for Plaintiff.

Mr. JAMES G. WILSON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

It was admitted that Mr. Wilson was an attorney and has
57 experience about the matters concerning which he proposed to testify.

Thereupon Mr. Wilson stated that he had been an attorney for the Portland Seed Company during the negotiations in respect to securing a refund on the two rates testified to by Mr. Parrington; that he had prepared all papers in the case, written a number of letters with reference to securing a refund from the Director General without the necessity of suit. Negotiations came to naught and he was compelled to file suit. In preparing the case for trial argued a demurrer; the argument consumed two days, and in preparation for argument a period of a week or ten days was necessary, and that he considers $75.00 a reasonable attorney's fee in one cause of action, and $100.00 to be such reasonable attorney's fee in the other.

Plaintiff rests.

The defendant offered no testimony.

Mr. Cochran: At this time we desire to request findings for the defendant, on the ground and for the reasons set forth in the demurrer to the complaint, which was argued at length before your Honor, among which may be mentioned that the complaint does not state

facts sufficient to constitute a cause of action, and, second, that the court is without jurisdiction of the subject matter of the action, and, third, that the facts as presented created a case wholly within the jurisdiction of the Interstate Commerce Commission, fourth, that the facts in evidence do not disclose a violation of the
58–61 fourth section of the Interstate Commerce Act, and the tariff was assessed from the points from and to which the shipments actually moved; that the charges in these tariffs were properly applied, and the amounts which were finally corrected, after the refunds were made, were in accordance with the tariffs that were actually applied and filed, and the plaintiff has not been damaged by any act of the defendant; and, as a conclusion from these facts, we think a judgment—and so request—should be in favor of the defendant.

The Court. In view of the ruling of the Court on the demurrer to the complaint, it seems to me there is only one conclusion it can arrive at in this case at this time. That is judgment in favor of the plaintiff for the difference between the long and short haul, and the Court will find $175.00 as reasonable attorney's fees.

Mr. Cochran: To the ruling of the Court in finding generally on the facts in favor of the plaintiff, we desire to note an exception, which exception was duly allowed.

Thereupon Mr. Wilson as counsel for plaintiff, submitted to the Court a request for findings and judgment in favor of the plaintiff in the manner following:

[Omitted; printed p. 38.]

62 Thereupon the defendant by its attorney, submitted in writing to the court the following objections in the Findings
63 of Fact and Conclusions of Law:

Defendant, by Charles E. Cochran, one of his attorneys, objects to the findings of Fact and Conclusions of Law requested by the plaintiff, that is to say:

I.

Defendant objects to proposed finding of fact No. III in respect to the rate on the shipments referred to in paragraphs I and II of the proposed finding of fact from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, of One & 51½/100 ($1.51½) Dollars per cwt. alleging said findings to be immaterial to the proper issues in this case.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

II.

Defendant objects to proposed finding of fact No. IV in effect reciting that Pecos, Texas, is a point more distant from Walla Walla and Yakima, respectively over the route on which shipments moved than Roswell, New Mexico, alleging said finding to be immaterial to the proper consideration of this case.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

III.

64 Defendant objects to proposed finding of fact No. V in effect reciting that the rate upon said shipment from Roswell, New Mexico, to Yakima, Washington, should not have exceeded Nine Hundred Forty & 66/100 ($940.66) Dollars, including war tax, and on the shipment to Walla Walla, Washington, should not have exceeded Five Hundred Thirty-seven & 92/100 ($537.92) Dollars, including war tax, and also finding that plaintiff was overcharged the sum of Three Hundred Seventy-one & 09/100 ($371.09) Dollars on the shipment to Yakima, and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, Washington, and alleges said finding to be immaterial and not in accordance with the lawful published and established rate on alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, respectively, which said rate is the sum of Two & 44/100 ($2.44) Dollars per cwt. including war tax.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

IV.

Defendant objects to finding of fact No. VI and alleges that since the plaintiff has not been overcharged, attorney's fees can not legally be allowed.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

V.

Defendant objects to conclusions of law proposed by plaintiff, and alleges such conclusions are not properly drawn from the fore-
65 going facts, but requests the Court to find that the proper freight charges upon said shipments respectively, were the sum of Thirteen Hundred Twelve & 04/100 ($1,312.04) Dollars, on the shipment to Yakima, Washington, and the sum of Seventeen Hundred Sixteen & 62/100 ($1,716.62) Dollars on the shipment to Walla Walla, Washington, said sums being the amounts exacted from the plaintiff on account of the movement of said shipments.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exceptions was duly allowed.

VI.

Defendant further objects to the allowance of any interest to the plaintiff, either at six (6%) per cent or any other rate per annum, from the date said freight charges were paid, even though it may

ORDER BILL OF LADING—ORIGINAL.

Shipper's No.

Agent's No.

RECEIVED subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at Roswell N M Dec 19th 1918

from E W Mitchell the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road or otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained (including conditions on back hereof) which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from

to

is in cents per 100 lbs.

If Three-Ist	If Second Class	If Third Class	If 4th Class	If 5th Class	If A Class	If B Class	If C Class	If D Class	If E Class

(UNITED STATES RAILROAD ADMINISTRATION)

(Mail Address—Not for purposes of delivery)

Consigned to ORDER OF E W Mitchell

Destination North Yakima State of Wash County of COPY

Notify Portland Seed Co

At North Yakima State of Wash County of

Route Car Initial MKT Car No. 87309

No. of Pkgs.	Description of Articles and Special Marks	Weight (Subject to Correction)	Class or Rate	Check Column
345	Bags alfalfa Seed	60581		
	COPY			
	above loaded in 16 oz			
	Seamless Cotton Bags			

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Collect

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Roswell N M., April 7th. 1919. COPY

~~I hereby certify that above is a true and~~ correct copy of original bill of lading.

E W Mitchell

COPY

Charges Advanced:

$ 19892

Exhibit Plaintiffs'

E W Mitchell Shipper. B L Rose Agent.

Per Per

(THIS BILL OF LADING IS TO BE SIGNED BY THE SHIPPER AND AGENT OF THE CARRIER ISSUING SAME.)

69

ENDORSEMENTS.

E. W. Mitchell

Morgan McKay & Co
By F. A. Morgan

Portland Seed Co
per D. Jansen
Credit Manager

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUN 1 1921
CLERK

UNIFORM BILL OF LADING.

Order Bill of Lading. Conditions

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay [illegible] the cause of God the public enemy compromise the authority of consigning the same for greater compensation on handling or for any use and shall not be held responsible for deviation or unavoidable delay in procuring such conveyance. Grain in bulk consigned to a point where there is a railroad public or [illegible] may [illegible] where such use is expressly noted herein, and then only pro rata per [illegible] these date and reduced [illegible]

ard... Standard form of Order Bill of Lading approved by Interstate Commerce Commission by Order No. 787, ... is to conform with the requirements of the Cummins-Amendment to the Act to Regulate Commerce, effective June 2, 1915.

The Atchison, Topeka & Santa Fe Railway Company.

Shipper's No.

ORDER BILL OF LADING—ORIGINAL.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at Roswell N M Jan 4th 191 C

from E W Mitchell the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from

to **is in cents per 100 lbs.**

If Prepaid	If Collect

If Commodities 1st Class	If 1st Class	If 2d Class	If 3d Class	If 4th Class	If 5th Class	If A Class	If B Class	If C Class	If D Class	If E Class

(Mail address Not for ...)

COPY

Consigned to ORDER OF E W Mitchell

Destination Walla Walla State of Wash County of

Notify Portland Seed Co

ENDORSEMENTS.

E W Mitchell
Morgan Mc Kay & Co.
Morgan Mc Kay & Co.
Roswell N.M.
Pay to the order of
The Alfalfa Seed Co
Roswell N.M.
Pay to the order of
Credit Manager

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUN 1 1921
CLERK

UNIFORM BILL OF LADING.

At Walla Walla Alfalfa Seed Co State of Wash County of

Route Car Initial MKT Car No. 93666

COPY

No. Packages	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT Subject to Correction	CLASS OR RATE	CHECK COLUMN
196	Bags Alf Seed	34538		
	Loaded in 16 oz Seamless Cotton Bags			

If charges are to be prepaid, write or stamp here "To be Prepaid"

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

COPY

Roswell N.M., April 7th.,1919.

I hereby certify that above is a true and correct copy of original bill of lading.

E W Mitchell

Charges Advanced

Ewmitchell Shipper. B.F.Rose Agent.

Per _____ Per _____

(THIS BILL OF LADING IS TO BE SIGNED BY THE SHIPPER AND AGENT OF THE CARRIER ISSUING SAME.)

Plaintiffs Exhibit 9 70

Service.

[Filed July 20, 1921.]

Due and legal service of the within Bill of Exceptions, prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 14th day of July, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

(Here follow bills of lading, marked pages 68-70, inc.)

71 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation re Exhibits Nos. 3 and 4 to Bill of Exceptions.

[Filed Jan. 19, 1922.]

Whereas, Plaintiff's Exhibits Nos. 3 and 4 are, respectively, freight bills of the United States Railroad Administration covering the carloads of alfalfa seed originating at Roswell, New Mexico, and routed via the Atchison, Topeka & Santa Fe lines to Denver, Colorado, and via Union Pacific System to Yakima, and Walla Walla, Washington; and

Whereas, the only purpose of such exhibits is to show what the freight was, the amount collected, and the route the shipment moved; and

Whereas, there is no dispute in respect thereto, nor is there any point made thereon in the Circuit Court of Appeals involving a dispute of the facts shown by such exhibits.

Now, therefore, it is stipulated and agreed between counsel for the parties hereto that the Clerk of the Lower Court in certifying the transcript to the Circuit Court of Appeals may omit said
72 Exhibits Nos. 3 and 4, and send this stipulation in lieu thereof, and that the recitals of this stipulation may have the same force and effect as said original Exhibits Nos. 3 and 4. James G. Wilson, Attorney for Plaintiff. C. E. Cochran, Attorney for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on the 4th day of August, 1921, there was duly filed in said Court, a stipulation for trial before the court without intervention of a jury, in the words and figures as follows, to wit:

S. DISTRICT COURT
DISTRICT OF OREGON
F I L E D
JUN 1 1921
CLERK

UNIFORM BILL OF LADING.

Order Bill of Lading—Conditions.

Section 1. The carrier or party in possession of any of the property described herein shall be liable for any loss thereof or damage thereto except as herein otherwise provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law or the act or default of the shipper or owner or for differences in

of compressing the same for greater safety or security in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in preserving such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded by the consignee) be delivered to such elevator, subject to the conditions of the governing tariffs, and the elevator charges on the same shall be a lien on the grain and the proceeds thereof in the hands of any party, and the carrier shall have no further responsibility for the grain after the delivery thereof as provided for in this section, and if no elevator is named herein, or if delivery cannot be made at the elevator named herein, delivery may be made at any regularly licensed elevator, or warehouse, at the option of the carrier, and the same shall be subject to a

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Service.

[Filed July 20, 1921.]

Due and legal service of the within Bill of Exceptions, prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 14th day of July, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

(Here follow bills of lading, marked pages 68-70, inc.)

71 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation re Exhibits Nos. 3 and 4 to Bill of Exceptions.

[Filed Jan. 19, 1922.]

Whereas, Plaintiff's Exhibits Nos. 3 and 4 are, respectively, freight bills of the United States Railroad Administration covering the carloads of alfalfa seed originating at Roswell, New Mexico, and routed via the Atchison, Topeka & Santa Fe lines to Denver, Colorado, and via Union Pacific System to Yakima, and Walla Walla, Washington; and

Whereas, the only purpose of such exhibits is to show what the freight was, the amount collected, and the route the shipment moved; and

Whereas, there is no dispute in respect thereto, nor is there any point made thereon in the Circuit Court of Appeals involving a dispute of the facts shown by such exhibits.

Now, therefore, it is stipulated and agreed between counsel for the parties hereto that the Clerk of the Lower Court in certifying the transcript to the Circuit Court of Appeals may omit said

72 Exhibits Nos. 3 and 4, and send this stipulation in lieu thereof, and that the recitals of this stipulation may have the same force and effect as said original Exhibits Nos. 3 and 4. James G. Wilson, Attorney for Plaintiff. C. E. Cochran, Attorney for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on the 4th day of August, 1921, there was duly filed in said Court, a stipulation for trial before the court without intervention of a jury, in the words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation for Trial Before Court Without a Jury.

[Filed Aug. 4, 1921.]

It is stipulated between plaintiff and defendant by and through their respective counsel, that a jury in the trial of the above-
73 entitled action be and the same is hereby waived, and the parties consent to try the action to the court.

Dated at Portland, Oregon, May 31, 1921. Geo. B. Guthrie, Of Attorneys for Plaintiff. C. E. Cochran, Of Attorneys for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on Thursday, the 4th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present: The Honorable Charles E. Wolverton, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order to Try Cause Before the Court Without a Jury.

[Filed August 4, 1921.]

Now at this time motion having been made in open court
74 by C. E. Cochran, of counsel for the defendant, that the oral stipulation heretofore entered into on May 31, 1921, waiving trial by jury, be substituted by a written stipulation, and Mr. James G. Wilson, of counsel for plaintiff, being present and concurring therein,

And it appearing to the Court that the written stipulation now offered should be substituted for the oral stipulation heretofore entered into,

It is ordered that the written stipulation waiving trial by jury be accepted by the clerk of this Court and filed August 4, 1921, but to be in effect as of May 31, 1921. Chas. E. Wolverton, Judge.

[File endorsement omitted.]

And afterwards, to wit, on the 29th day of September, 1921, there was duly filed in said Court, a petition for writ of error, in words and figures as follows, to wit:

75 In the District Court of the United States for the District of Oregon.

[Title omitted.]

Petition for Writ of Error.

[Filed Sept. 29, 1921.]

James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), defendant in the above-entitled cause, considering himself aggrieved by the final order and judgment of this Court made and entered against him and in favor of the plaintiff on the first day of June, 1921, and in rulings and instructions in said action made as set forth in its assignments of error filed herein, petitions said Court for an order allowing said defendant to procure a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit in that behalf made and provided:

And also that an order be made fixing the amount of se-
76 curity which the defendant shall give and furnish upon said writ of error, and that upon giving such security all further proceedings in this Court be suspended and stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage of the defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said Circuit Court of Appeals.

Wherefore defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this Court for the correction of errors so complained of, and that a transcript of the record of proceedings, papers and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer. Arthur C. Spencer, John F. Reilly, Charles E. Cochran, Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, this 29th day of September, A. D. 1921. James G. Wilson, Attorney for Plaintiff.

77 [File endorsement omitted.]

And afterwards, to wit, on the 29th day of September, 1921, there was duly filed in said Court, an assignment of errors, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Assignments of Error.

[Filed Sept. 29, 1921.]

Comes now the defendant above named, James C. Davis, Agent United States Railroad Administration, appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys of record, and says that the judgment and final order of this Court made and entered in the above-entitled Court on the first day of June, 1921, in favor of the plaintiff above named and against the defendant above name is erroneous and against the just rights of the defendant, and files herein together with his petition for
78 writ of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of the said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint, which said demurrer alleged that the Court had no jurisdiction of the subject of the action.

II.

The Court erred in denying the defendant's request for findings in his favor, which request was based upon the reasons, among others, that the complaint does not state facts sufficient to constitute a cause of action, that the Court is without jurisdiction of the subject matter of the action, and that the facts as presented create a case wholly within the jurisdiction of the Interstate Commerce Commission, that the facts in evidence do not disclose a violation of the fourth section of the Interstate Commerce Act, and that the tariff was properly assessed and applied, and that the plaintiff had not been damaged by any act of the defendant.

III.

The Court erred in finding in favor of the plaintiff on the evidence submitted, and in sustaining plaintiff's request for findings and judgment in its favor.

IV.

The Court erred in respect to finding of fact No. III over the objection of defendant that there was established and in effect
79 over the lines which the shipments described in the complaint moved from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, a rate of $1.51½ per cwt.

V.

The Court erred in finding that Pecos, Texas, is a point more distant from Walla Walla and Yakima, Washington, over the route of which said shipments moved than Roswell, New Mexico, and that the defendant secured no permission from the Interstate Commerce Commission to charge higher rates for transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, than from Pecos, Texas, over said route.

VI.

The Court erred in its finding of fact No. 5 in reciting that the rate upon said shipments from Roswell, New Mexico, to Yakima, Washington, would not have exceeded $940.66, including war tax, and that the shipment to Walla Walla, Washington, should not have exceeded $537.92, including war tax, and also finding that plaintiff was overcharged the sum of $371.09 on the shipment to Yakima, and the sum of $177.87 on the shipment to Walla Walla, Wash.

VII.

The Court erred in allowing the plaintiff the sum of $175.00 as attorney's fees which the Court taxed as a part of the costs herein.

VIII.

The Court erred in concluding as a matter of law that
80 the plaintiff was entitled to a judgment against the defendant in the sums of $307.09 overcharges on the shipment to Yakima, Washington, and $177.87 overcharges on the shipment to Walla Walla, Washington, and the further sum of $175.00 as attorney's fees taxed as a part of the costs of said action.

IX.

The Court erred in entering judgment in favor of the plaintiff and against the defendant for the foregoing amounts mentioned in the eighth assignment of error.

Wherefore the said defendant and plaintiff in error prays that said judgment of the District Court be reversed with directions to the District Court to enter a judgment in favor of the defendant. Arthur C. Spencer, John F. Reilly, Charles E. Cochran.

Service by copy admitted at Portland, Oregon, this 29th day of September, 1921. James G. Wilson, Attorney for Defendant.

[File endorsement omitted.]

81 And afterwards, to wit, on Friday, the 30th day of September, 1921, the same being the seventy-seventh judicial day

of the regular July term of said Court—Present: the Honorable Robert S. Bean, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order Allowing Writ of Error.

[Filed Sept. 30, 1921.]

On this 30th day of September, 1921, came the defendant above named, James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys of record, and filed herein and presented to the Court his petition praying for the allowance of a writ of error from the decision and judgment of this Court, made and entered on the first day of June, 1921, in favor of the plaintiff above named and against
82 said defendant from the rulings and instructions made on trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this Court, together with certain assignments of error intended to be urged by him within due time:

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now therefore, in consideration thereof this Court does allow said writ of error upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Two Thousand and 00/100 ($2,000.00) dollars, to the effect that if said defendant, James C. Davis, Agent, United States Railroad Administration, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void,
83 otherwise to remain in full force and virtue, the said bond to be approved by the Court and

It is ordered that all proceedings in this Court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 30th day of September, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

And afterwards, to wit, on the 30th day of September, 1921, there was duly filed in said Court, a bond on writ of error, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

84 **Bond on Writ of Error.**

[Filed Sept. 30, 1921.]

Know all men by these presents that James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), principal, and National Surety Company of New York, a corporation, surety, are held and firmly bound unto the Portland Seed Company, the plaintiff above-named, in the sum of Two Thousand and 00/100 ($2,000.00) Dollars, to be paid to the said The Portland Seed Company, to which payment well and truly to be made we bind ourselves and each of us severally and jointly and each of our successors and assigns firmly by these presents sealed with our seals and dated this 30th day of September, 1921.

Whereas, the above-named James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the first day of June, 1921.

Now the condition of this obligation is such that if the above-named James C. Davis as agent, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void,
85 otherwise to be and remain in full force and effect. James C. Davis, Agent United States Railroad Administration, by C. E. Cochran, One of His Attorneys. The National Surety Company of New York, by E. P. Welch, Resident Vice-President. [Seal of the National Surety Co. of New York.] Attest: D. E. Gorton, Resident Asst. Secy.

Countersigned at Portland, Oregon, this 30th day of September, 1921. E. P. Welch, Resident Agent.

Examined and approved this 30th day of September, 1921. R. S. Bean, District Judge.

Service by copy admitted at Portland, Oregon, this 29th day of September, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

86 And afterwards, to wit, on the 31st day of December, 1921, there was duly filed in said Court, a stipulation as to exhibits, in words and figures, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Stipulation re Exhibits.

[Filed Dec. 31, 1921.]

It is stipulated between counsel for plaintiff and defendant that the original exhibits, namely, Plaintiff's Exhibits Nos. 1, 2, 3, and 4, may be detached from the original bill of exceptions and attached to the copy thereof which the Clerk of the District Court will prepare and certify for the purpose of docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit. Wilson & Guthrie, Attorney for Plaintiff. C. E. Cochran, of Attorneys for Defendant.

87 [File endorsement omitted.]

And afterwards, to wit, on the 31st day of December, 1921, there was duly filed in said Court, a præcipe for transcript, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Præcipe for Transcript of Record.

[Filed Dec. 31, 1921.]

To the clerk of the above-entitled court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the ninth circuit, under the writ of error perfected herein and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

88 1. The Complaint.
2. Demurrer to Complaint.
3. Order overruling demurrer.
4. Order substituting James C. Davis, as Agent United States Railroad Administration, in lieu of John Barton Payne.
5. Answer.
6. Reply.
7. Bill of exceptions and certificate attaching original exhibits to the transcript pursuant to stipulation of counsel.
8. Judgment.
9. Petition for writ of error.
10. Assignments of error.
11. Order allowing writ of error and fixing bond.
12. Supersedeas bond and bond for costs.

13. Writ of error.
14. Citation on writ of error.
15. This præcipe and any and all records, entries, pleadings, papers and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

A. C. Spencer, J. F. Reilly, C. E. Cochran, Attorneys for Defendant.

89 Service by copy admitted at Portland, Oregon, this 31st day of December, A. D. 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
District of Oregon, ss:

Certificate of Clerk U. S. District Court to Transcript of Record.

I, G. H. Marsh, Clerk of the United States District Court of the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to eighty-eight, inclusive, constitute the transcript of record upon writ of error in the case in said court in which the Portland Seed Company, a corporation, is plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) is defendant and plaintiff in error; that the foregoing pages contain a true and complete transcript of the record and proceedings had in said court in said cause in accordance with the præcipe for transcript filed in said cause by said plaintiff in error, as the same appears of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript
90 is $22.75, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 23d day of January, 1922. G. H. Marsh, Clerk. [Seal.]

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order Extending Time to and Including December 31, 1921, to File Record and Docket Cause.

[Filed Jan. 25, 1922.]

Now at this day, for good cause shown it is ordered that the time for filing the transcript of record in the above-entitled cause and

docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to December 31, 1921. Chas. E. Wolverton, Judge.

91 [File endorsement omitted.]

In the District Court of the United States for the District of Oregon.

[Title omitted.]

Order Extending Time to and Including January 20, 1922, to File Record and Docket Cause.

[Filed Jan. 3, 1922.]

On this date, for good cause shown, it is ordered that the time for filing the transcript of record in the above-entitled cause and docketing same in the United States Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to January 20th, 1922. R. S. Bean, Judge.

[File endorsement omitted.]

92 In the Dnstrict Court of the United States for the District of Oregon.

L–8723.

January 18, 1922.

[Title omitted.]

Order Extending Time to and Including January 28, 1922, to File Record and Docket Cause.

[Filed Jan. 25, 1922.]

Now at this day for good cause shown, it is ordered that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and inclusive of January 28, 1922. R. S. Bean, Judge.

[Endorsement omitted.]

93 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3828.

[Title omitted.]

Upon Writ of Error to the United States District Court of the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

94 *Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

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95 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. L-8723.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

Stipulation for Consolidation of Causes for Trial.

[Filed Jan. 11, 1922.]

96 It is stipulated and agreed between counsel for the respective parties to the above causes of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First. That the above-entitled three causes of action may be consolidated for trial in the above-entitled Court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second. That the transcript of record in the case of James C. Davis, Director General, plaintiff in error, vs. The Portland Seed Company, defendant in error, docketed and filed in this Court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L-8723, James C. Davis, Agent, Plaintiff in error, vs. The Portland Seed Company, defendant in error, and the decision of said case shall not follow the order in the other two cases above-mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L-8723.

Dated at Portland, Oregon, this 9th day of January, 1922. C. E. Cochran, Of Counsel for Plaintiffs in Error. James G. Wilson, Counsel for Defendant in Error.

97 Dated: San Francisco, California, January 11, 1922.
So Ordered: W. H. Hunt, United States Circuit Judge.

[File endorsement omitted.]

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand, nine hundred and twenty-two.

Present: Honorable Erskine M. Ross, Circuit Judge, Presiding; Honorable William W. Morrow, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

98 No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

Order of Submission.

Ordered leave granted Mr. Ben C. Dey, to appear as amicus curiæ;

Further ordered above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as amicus curiæ, and by Mr. James G. Wilson, counsel for the defendant in error in each

of the above-entitled causes, and submitted to the court for consideration and decision, with leave to Mr. Dey to file a brief as amicus curiae within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

99 **Order Filing Opinion, etc.**

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this Court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis,
100 etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

[Filed June 5, 1922.]

Upon Writs of Error to the District Court of the United States for the District of Oregon.

101 Before Ross, Morrow, and Hunt, Circuit Judges.

On Writs of Error to Review Judgments in Favor of Shippers for Recovery of Excess Charges by Carriers.

Parrington's Cases.

HUNT, *Circuit Judge:* These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette Rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916, the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a mini-

mum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods men-
102 tioned the rate as per the Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June 25, 1918, was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

The Seed Company Case.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Hunt-
ington, Oregon, thence by Oregon-Washington Railroad and
103 Navigation Lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1,311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant from Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the point rate via the rail and water line. The accu-
104 racy of this reasoning depends upon whether the case is to be considered in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified
105 except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designation common carrier may be relieved from the operation of this section.'" (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Comission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn. R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co., vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however,

point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co., vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it is was unnecessary to ap-
106 ply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the same case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words
107 "or route," it called for a new, and we believe, a broader interpretation by which the word "route" is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R. — U. S. —, Feb. 27, 1922.) We have here too the circumstances that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as amicus curiæ it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the

contrary intent is to be gathered from the provision of section 206 (*a*) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the
108 President for such purpose." There is also a further provision that such action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted the carriers to violate the long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as amicus curiæ has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robertson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of
109 a decision of the Interstate Commerce Commission which was not mentioned in the pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increase in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other that at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years
110 after the cause of action has accrued and not after. Prior to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Webster R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision
111 as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R. Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respect the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that court as attorneys' fees, fees
112 for conducting the cases in this court are also allowed. (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862.) A reasonable fee in case #3799 in this court is $600; in case #3800, $1,000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[File endorsement omitted.]

United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Judgment U. S. Circuit Court of Appeals.

[Filed June 5, 1922.]

In Error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in
113 this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorney's fee in the sum of $100.00 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[File endorsement omitted.]

United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Order Staying Issuance of Mandate.

[Filed June 17, 1922.]

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ordered man-
114 date in the above entitled-cause stayed to and including Aug. 31, 1922, to enable counsel for the plaintiff in error to apply to the Supreme Court of the United States for the issuance of a writ of certiorari, and in the event the said petition is filed

with the Clerk of said Supreme Court within the time extended, said Mandate of this Court shall be stayed until after the Supreme Court passes upon the said petition for writ of certiorari. Wm. H. Hunt, United States Circuit Judge. Dated: June 17, 1922.

[File endorsement omitted.]

115 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from and including 1 to and including 114, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

116 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, this 16th day of August, A. D. 1922. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. [Seal of United States Circuit Court of Appeals, Ninth Circuit.]

117 **Writ of Certiorari and Return.**

[Filed Dec. 20, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, as Agent, United States Railroad Administration, is plaintiff in error, and The Portland Seed Company is defendant in error, No. 3828, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Cir-

cuit Court of Appeals and removed into the Supreme Court
118 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

119 [Endorsed:] File No. 29,123. Supreme Court of the United States, October Term, 1922. No. 573. James C. Davis, as Agent, etc., vs. The Portland Seed Company. Writ of Certiorari.

120 & 121 In the Supreme Court of the United States, October Term, 1922.

No. 573.

James C. Davis, Agent United States Railroad Administration, Petitioner,

vs.

The Portland Seed Company, Respondent.

Stipulation.

Because a Writ of Certiorari has been duly issued, dated the second day of December, 1922, in the above entitled action by the Supreme Court of the United States directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, requiring the record and proceedings in the aforesaid cause to be sent without delay to the said Supreme Court, it is

Stipulated and agreed by counsel for the respective parties that the transcript of record filed with the application for the writ of Certiorari may be taken as a return thereto and no new transcript made.

Dated at Portland, Oregon, this 14 day of December, 1922. C. E. Cochran, Counsel for Petitioner. James G. Wilson, Counsel for Respondent.

122 [File endorsement omitted.]

[File endorsement omitted.]

Supreme Court, U. S.
FILED
JAN 17 1924
WM. R. STANSBURY
CLERK

No. 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, PETITIONER,

v.

PORTLAND SEED COMPANY, RESPONDENT.

UPON WRIT OF ~~ERROR~~ certiorari TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE. WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Petitioner.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, petitioner,
v.
PORTLAND SEED COMPANY, RESPONDENT.

No. 114.

UPON WRIT OF ~~ERROR~~ certiorari TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE. WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

REASONS FOR AND SCOPE OF SUPPLEMENTAL BRIEF.

This supplemental brief upon behalf of the petitioner, James C. Davis, Agent of the President and Director General of Railroads, is necessary for the following reasons:

(1) To place before the Court a somewhat different construction of the fourth section with reference to

damages than that set forth in the brief heretofore filed upon behalf of the petitioner but prepared by counsel for the carrier formerly under Federal control, the Oregon-Washington Railroad & Navigation Company.

(2) To place before the Court certain additional reasons why the Director General should not be held subject to the fourth section.

(3) To point out to the Court certain deficiencies in the record before the Court which may prevent the Court from considering facts of the utmost importance, and of which the Court should be advised in order that the Court may properly delimit its decision on this record so as to avoid any possibility of prejudicing a consideration of such facts if properly presented on other records.

This case involves alleged violations of the long-and-short-haul clause of section 4 of the Act to Regulate Commerce, in connection with two shipments of alfalfa seed, both originating at Roswell, New Mexico, and being consigned, respectively, to Yakima and Walla Walla, Washington, the first being shipped on December 19, 1918, and the second on January 4, 1919. Charges were collected on the published through rate of $2.44 per hundredweight. There was contemporaneously in effect from Pecos, Texas, a point more distant from both Yakima and Walla Walla than Roswell, New Mexico, a rate of $1.51½.

At the outset, and before undertaking to discuss the proper construction of the fourth section or its

application to the Director General, it is desired to point out to the court the deficiencies of this record.

This record fails to show affirmatively, what was the fact, that from and after June 25, 1918, the Interstate Commerce Commission had by its fourth section order 7316 granted relief to the Director General from the provisions of the fourth section under the powers conferred upon the Commission by the first proviso of that section

> from time to time (to) prescribe the extent to which such designated common carriers may be relieved from the operation of this section,

and that reference to the Commission's order appeared on the face of the tariffs themselves.

There is appended to this brief a copy of this fourth section order of the Commission.

It should be noted, moreover, that while this fourth section order was not made part of the record in the District Court, some intimation of it apparently was given to the Circuit Court of Appeals, as appears from the decision of that court. (Tr. 51.) It would seem, however, that the order was either not clearly put before the court, or the court did not clearly understand it. In any event, the court held that, since it had not been considered by the lower court, it was not before the Court of Appeals for decision. The Director General is not advised whether, under the peculiar circumstances of this case, this Court will take judicial notice of this order. The existence or nonexistence of such an

order, however, may well be, as will subsequently appear, of controlling effect in determining whether damages should be awarded in connection with the fourth section, and as this case is but one of a considerable number of cases which are now or will shortly be before this Court, it is essential to refer to the order, if for no other purpose than to distinguish those cases where it properly appears of record.

Likewise it might seem that, since it is the Director General's contention that he was not subject to the fourth section, it would be superfluous for him to discuss the question of damages under that section. The Director General, however, believes that nothing will more clearly serve to demonstrate that the fourth section could not have been applicable to him than a correct understanding of the meaning of that section, and of what Congress intended to accomplish by it. Therefore, before discussing the applicability of the fourth section to him, the Director General will seek to make clear what he believes to be the proper construction of that section, since by so doing it must become obvious that the provisions of that section are necessarily in direct conflict with the power to initiate rates conferred upon the President by the Federal Control Act, and by the President delegated to him.

Moreover, as this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in

excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth section as a whole, and of its interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as shown by various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, first be discussed, and then the question as to whether the Director General was subject to that section.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the respondent (hereinafter referred to as the plaintiff), and the theory of both the District Court and of the Circuit Court of Appeals, is that the rate legally applicable between Roswell and Walla Walla, and the rate which the carrier, therefore, should have collected was not the higher rate actually published in the tariffs between Roswell and Walla Walla,[1] but was the lower rate published in the tariffs from Pecos, the more distant point, to Walla Walla. In other words, it is the plaintiff's contention, and the theory of both courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section to the tariffs, the higher rate actually published from Roswell to Walla Walla becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect be treated as actually published from that point and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published between Roswell and Walla Walla was a

[1] For convenience reference will be made here only to the shipments from Roswell to Walla Walla, the situation as to the two shipments in relation to the fourth section being similar.

straight overcharge above what is contended to be the only legally published rate, the lower rate from Pecos to Walla Walla, though this latter rate was never actually published from Roswell.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct conflict with what would seem to be the conclusion necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected under all circumstances.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument

what he contends to be the correct construction of the fourth section with reference to damages, before attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of the Commission. For convenience the fourth section has been appended in full to this brief.[2]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as follows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or because greater than the aggregate-of-intermediates, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

> (a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter

[2] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates

clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate from or to (as the case may be) the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the

point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, and while the record fails to show, what was the fact, that the Commission had relieved the Director General from the operation of the fourth section and that the tariffs themselves actually bore a reference to the

Commission's order, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the Director General to rebut what might otherwise be contended, that the rate from Roswell for the shorter distance was prima facie unreason-

[4] Again, for the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the joint brief heretofore filed attacks the jurisdiction of the court in this respect.

able because of the lower rate for the longer distance from Pecos.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate from Roswell, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the District Court and the Circuit Court of Appeals, that the higher rate actually published from Roswell to Walla Walla, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect, be treated as actually published from that point, and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally

collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrates the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by, mere *publication* of a rate, but forbids, and is violated only by, the *charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from Roswell to Walla Walla to be read out of the tariffs, there is not provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section which will warrant *reading into the tariffs* the lower rate published solely from Pecos to Walla Walla, so as to treat it as if actually published from Roswell to Walla Walla. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged

too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor

either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the

higher rate actually published between Roswell and Walla Walla out of the tariffs, and to permit the carriers to charge between Roswell and Walla Walla the lower rate actually published only from Pecos to Walla Walla, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for such transportation of * * * property * * * between the points named in such tariffs *than the rates*, fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified*,

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges

> upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from Roswell to Walla Walla, and to charge only the lower rate actually published from Pecos to Walla Walla, is afforded if the Director General be correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate between Roswell and Walla Walla could be ignored,

since so far as this record goes there is nothing to show that there had been any actual movement from Pecos to Walla Walla and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation

resting upon the carrier to collect the published rate, even though it violates the fourth section.

The case of *United States* v. *Louisville & Nashville R. R., supra*, is cited on page 37 of the brief of the respondent, and the following language is quoted from pages 322 and 323 of that decision:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on application made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases*, 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.)

The respondent completely and blandly ignores the context in which this language was used. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above, but which the respondent did not italicize in its brief, clearly implies the Court's recognition of the fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, nevertheless, to continue in force until changed as provided by

law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand, the *Piper case*, which is not even cited by the plaintiff (respondent) in its brief, might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from ~~San Francisco~~ Roswell to ~~North Portland~~ Walla Walla violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the shipper, although the form of the bill of

lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published between Roswell and Walla Walla and read into the tariff the rate actually published only between Pecos and Walla Walla without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*, consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a

> lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth

section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

Mississippi Valley Iron Co. v. *Director General*, 74 I. C. C. 715.

Wilson & Co. v. *Director General*, 74 I. C. C. 555.

In certain of these decisions it is true that the Commission granted reparation because it found the rates otherwise unlawful. In certain of them, moreover, as will subsequently be pointed out, the Interstate Commerce Commission was itself in error in holding the long-and-short-haul clause violated, since in none of them was there any proof that the lower rate for the longer distance was actually charged and received. Likewise, in certain of them the Commission's own records should have shown that the departures from the long-and-short-haul clause of fourth section were protected by the Commission's fourth section order 7316.

The significance of these cases, however, in connection with this portion of the argument is that whether the Commission was right or wrong in holding that the fourth section was violated, the Commission still held that the higher rate at the intermediate point was the legally applicable rate, even where the Commission awarded reparation because the legally applicable rate was otherwise unlawful.

The grounds upon which the Commission recognizes that section 6 must be construed as mandatory in requiring the collection of the legally published rate, whether or not that rate be unlawful under other sections of the Act, are well set out in the Commission's decision in *Crescent Coal & Mining Co. v. C. & E. I. R. R. Co.*, 24 I. C. C. 149, pp. 156, 158. The Commission there says:

> The sole question to be determined in the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate *under other sections of the act* with its *legality* under section 6. For example, a rate unreasonably high and unlawful in the sense of section 1 may, nevertheless, be the legally established standard and rule of action under section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute. This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether

knowingly in the usual course or inadvertently or for collusive or other improper purposes.

* * * * *

In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act: and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * *

> *This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law, but with the only construction which will preserve the chief function of section 6,* which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the decision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate

under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 12.) It will suffice to say here that the right of a court to award damages for violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the

fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the Court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between

given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. More extended reference will subsequently be made to the Congressional Debates in connection with the amendment of the fourth section in 1910, in order to show so far as possible what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates

clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point andby taking constructive possession of a shipment and rebilling it to its ultimate destination, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more

distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails

to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of

that section[6] and that where such relief is granted a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause have frequently been expressed.

section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The controlling importance, however, of this distinction is well illustrated by this very case. While here, as already explained, the record fails to show what was the fact, that is, that the Commission had actually issued an order relieving the Director General on and after June 25, 1918, from the operation of the fourth section, and that the tariffs on their face bore reference to this order, the record still fails

to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published to North Portland, was ever actually charged and received. In other words, the defect of this record in failing to show relief from the fourth section becomes unimportant, since, as there was no actual departure from the long-and-short-haul clause, there was no necessity for relief.

Nevertheless, a consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose on the one hand that the practically penal provisions of the fourth section should not be held applicable to the Director General, while on the other hand that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates,

even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points in La. & Tex.*, 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Anaconda Copper* cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage which it would have applied in the absence of any supposed violation, and had the question merely been as to whether damage had otherwise been proved under the first, second, or third sections of the act. This is clearly shown by the two majority reports of Commissioner Hall in the *Iten Biscuit* case and by the dissenting report of Commissioner Harlan in the *Oregon Fruit* case, which was directed to the report in the *Iten Biscuit* case as well. It is to be noted in this connection that Commissioner Harlan erroneously assumed, as did the majority, that an actual violation of the long-and-short-haul clause was involved, and on that assumption his criticism of the decision of the majority as failing to give any force whatever to the express provisions of the long-and-short-haul clause of the fourth section itself is un-

deniably sound. Commissioner Harlan says in the *Oregon Fruit* case, 50 I. C. C. 719, at page 723:

> The majority report nevertheless does not even place upon the carriers at fault the burden of showing that the higher rates at the intermediate points were reasonable and nondiscriminatory, but leaves upon the complainant the burden of supporting its claim for reparation by showing the rates to have been unreasonable or unjustly discriminatory, *precisely as if there were no fourth section at all in the act to regulate commerce.*

That Commissioner Harlan was not in error as to the theory of the majority—that is, that a violation of the fourth section does not involve any different criteria of damage than a violation of the first, second, or third sections—is fully confirmed by the specific holding of Commissioner Hall to this effect, noting on page 733 that the higher rate for the shorter distance was not itself unreasonable. Commissioner Hall had said on page 732, with reference to the decision of this court in the *International Coal* case, 230 U. S. 184:

> While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

And again on page 733:

> Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3

> there must be proof of damage and under section 4 the departure therefrom is of itself proof of damage.

It should be noted that in the latter quotation from Commissioner Hall's report he assumes that the only alternative to holding that for violations of section 4 there must be the same proof of damage as required by the *International Coal* case for violations of sections 2 and 3, is to hold that under section 4 the departure therefrom is of itself proof of damage. In this Commissioner Hall was doubtless misled by the contention of the complainants in that case, noted at page 731 of his report, where he says:

> With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate charged for the longer distance, and that this pre-

sumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under all circumstances be collected. On the one hand,

therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section 4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial, is to give no effect whatever to the express declara-

tion of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what constitutes violation under the aggregate-of-interme-

diates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does not consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-short-haul clause does not make the charging of the

lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the violation can not be avoided except by charging the

same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of damage must be the difference between the higher

published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under sections 1, 2, or 3 had the aggregate-of-intermediates

clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation

of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the pre-

sumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable

80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar circumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual

violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what

profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a

penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act. Were it a penalty it clearly would not have been applicable against the Director General. *Mo. Pac. R. R. Co.* v. *Ault*, 256 U. S. 554. Nevertheless, while it is not a penalty, the Director General submits that the public wrong aimed at was one of which it could not be presumed the government itself would be guilty in the operation of the railroads, but rather a wrong incident to the stress of competition under private control. Therefore the Director General contends that the harshness of the rule of damages under the fourth section flowing from the nature of the public wrong at which that section was aimed during private control serves to make clear that that section itself should not be held applicable to him.

Before discussing this ultimate contention, however, it is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that, even if the almost penal provisions of the fourth section be held — as they should be — inapplicable to the Director General, the shippers still have protection against the charging of a higher rate for a shorter distance, or of a higher through rate

than the aggregate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 6 to 13 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 10 to 13. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual

violation of the long-and-short-haul clause, because of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because

greater than an existing combination, but that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged

and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since it neither proved nor attempted to prove that any shipments ever moved from Pecos upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not purport to cover any incidental damages for viola-

tions of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

It remains to consider whether the fourth section itself can be held applicable to the Director General.

IV.

The Director General should not be held to have been subject to the fourth section.

It has already been suggested that the proper construction of the fourth section with reference to damages for actual violations thereof tends strongly to show that that section could not have been intended to apply to the Director General because of the harshness of the rule of damage necessitated by conditions of private control. Furthermore, it has been noted that questions have at least been raised as to whether or not the Commission has power under the first proviso of the fourth section as amended in 1910 to relieve a carrier from the operation of the aggregate-of-intermediates clause, or whether that power is confined to relief from the long-and-short-haul clause.[8]

[8] Chairman Mann, of the Interstate Commerce Committee of the House, expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation, to authorize a company to charge less for the long haul than they do for the short haul." Pages 4579, 4580, Congressional Record, April 12, 1910.

It will be noted that the first sentence above quoted applies to both clauses of the fourth section, while the second sentence refers spe-

If this power does not extend to the aggregate-of-intermediates clause, further argument is furnished why the fourth section should not be held applicable to the Director General. It would impose upon the government under the aggregate-of-intermediates clause, practically absolute liability for damages from which the Commission would be powerless to relieve it, such stringent liability having been imposed upon private carriers because of abuses incident to competition under private operation without any analogy under Government control.

Again, it has been argued by the plaintiff and by shippers generally that, even if the Commission has power to relieve from both clauses of the fourth section, it can not grant such relief by any such blanket order as it actually made in the case of the Director General. (See its fourth section order 7316 in the Appendix.) Assuming this to be so, it would but make still more clear the impropriety and injustice of attempting to apply the fourth section to the Director General. It would mean that the Director General or, in other words, this government, faced with a tremendous war emergency, demanding an immediate increase in revenue in order, as the President's proclamation recites, to provide for the carrying on of essential transporta-

cifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand, the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

tion for war purposes, could obtain no practical relief from the Commission from violations of the fourth section surviving over from private control, and involving, if no relief should be obtainable, substantial reductions in revenue, since the emergency made it impossible to investigate each rate and each tariff, and therefore to enter a separate order as to each.

All these considerations, however, are but inducements leading up to the fundamental and insurmountable objection to any attempt to apply the fourth section to the Director General; that is, that the application of that section to the Director General would be in direct and inevitable conflict with the power conferred upon the President by section 10 of the Federal Control Act—

> that during Federal control, whenever in his opinion the public interest requires, *the President may initiate rates*, fares, charges, classifications, regulations, and practices, *by filing the same with the Interstate Commerce Commission*, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

There is nothing ambiguous about the power conferred upon the President under section 10. It is unrestricted power to initiate rates *by filing* them with the Interstate Commerce Commission. There is no limitation upon the character of the rates to be initiated, and there is specific provision against the Commission suspending their effectiveness after

they are so initiated. Yet if the fourth section be applicable to the Director General, the President, through the Director General, could not by filing a rate with the Interstate Commerce Commission have initiated a rate, the collection of which would violate the provisions of the fourth section, so as to render such a rate a lawful rate free of any ultimate liability, without first obtaining the permission of the Interstate Commerce Commission for such filing, and therefore for such initiation.

That the fourth section as amended in 1910 was specifically intended to and did deprive the carriers of the power to initiate such rates can no longer be a matter of speculation or construction. In the *Intermountain Rate Cases*, 234 U. S. 476, this court, speaking through the late Chief Justice, at pages 482 to 486, said:

> Almost immediately after the adoption of the Act to Regulate Commerce in 1887 (February 4, 1887, c. 104, 24 Stat. 379) the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long-and-short-haul clause *and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions* and consequently to exact in the event of such difference a lesser charge for the longer haul than was exacted for the shorter haul, and that competition which ma-

terially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. *We say primarily, because, of course, it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission* in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were, therefore, operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction being authorized could not be a preference or discrimination, and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin. (Pages 482, 483.)

* * * * *

It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary

judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. *It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review.* And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long-and-short-haul clause it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. *Texas & Pac. Railway* v. *Interstate Com. Comm.*, 162 U. S. 197, 218.

With the light afforded by the statements just made, we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short-haul clause in a sense unqualified except

in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short-haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function.* In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist*, because to do so, in the absence of some authority, would not only be inimical

> to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. *But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission,* the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections. (Pages 483, 484, 485, 486.)

Had Chief Justice White been passing specifically upon the question of the propriety of the application of the amended fourth section to the Director General, he could not have stated more conclusively the insurmountable objections to any such application. It will be noted, from those portions of his opinion which have been here italicized, that the provisions of the fourth section prior to its amendment in 1910 would have been entirely consistent with the unrestricted power conferred upon the President to ini-

tiate rates of any character. It will be observed that Chief Justice White construed the fourth section prior to its amendment as leaving to the carriers the primary right to initiate such rates—

> subject to the subsequent supervision and control of the Interstate Commerce Commission and to ultimate judicial review.

On the other hand, it will be observed that because of the abuses, or supposed abuses, by the carriers in the exercise of this primary judgment Congress—

> shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of the public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist. * * * But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted.

This being so, the Director General in the operation of the carriers during Federal control must be held to have been exempted from the amended fourth section of the Interstate Commerce Act by the

express provision of section 10 of the Federal Control Act that—

> carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, *except in so far as may be inconsistent with the provisions of this act* or any other act applicable to such Federal control or with any order of the President.

It would be superfluous, therefore, to indulge in any further argument to demonstrate that section 4 as amended is in direct and necessary conflict with the power conferred by section 10 itself upon the President to initiate rates. It, however, may do no harm to suggest why, in any event, it could not reasonably be assumed that that section as amended was intended to apply to the Director General. The amendment was, as already stated, directed to the abuses by private carriers, perhaps less serious than represented to Congress, in the initiation of such situations under the stress of competitive conditions under private operation. It certainly can not be presumed that Congress would impute to the President or the Director General either ulterior motives in initiating such rates or be unwilling to trust the judgment of the President or of the Director General in the first instance. Furthermore, competitive conditions were eliminated by Federal control, which were at the bottom of the evil aimed at during private control. Moreover, without the amendment of 1910 and as section 4 had previously stood, sup-

ported as it was by sections 1, 2, and 3, the President's initial power would have been, like the carriers', in any event, subject to the ultimate review and control of the Commission. The Director General then believes it impossible to reach any other conclusion than that section 4 as amended in 1910 was inapplicable to him.

Curiously enough, however, the Interstate Commerce Commission has itself concluded to the contrary, in the case of *Johnson* v. *A. T. & S. F. Ry. Co.*, 51 I. C. C. 356. More extraordinary still, the Commission undertook to determine a question of this great importance to the Director General in a case to which he was not even a party and in which he had no representation by counsel or otherwise, and over the protest of the then chairman of the Commission, Mr. Daniels. The Commission said, p. 361 of its opinion:

> Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the federal control act of March 21, 1918, and the full exercise of power conferred thereby. That act expressly provides that rates initiated by the President "shall be reasonable and just." Under section 4 of the act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned, and the burden is placed upon

the carriers of showing that the situations apparently within the scope of the prohibition are in reality "special cases," justifying the exercise by us of a sound, legal discretion in authorizing departures from the general rules laid down. *It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control or in any wise hinder the prosecution of the war.* As the situations covered by the fourth section can be reached by orders under the first three sections of the act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroads and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us fourth section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

The act to regulate commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the federal control act or other acts applicable to federal control or with any order of the President. There has been no order of the Presi-

> dent in the exercise of his war powers declaring that the enforcement of section 4 interferes with the efficient operation of railroads and systems of transportation under federal control. Clearly no such declaration is contained in the act itself, and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of section 4 it must be presumed that language appropriate to that end would have been used, as was done with the power of suspension under section 15.

It can only be said with reference to the Commission's foregoing expression of opinion on this question that, had the Commission chanced the possible benefit of an expression of the Director General's views in the premises, the Commission, at least, would not have been permitted to labor under the singular misapprehension indicated in the portion of its opinion first italicized, where the Commission states:

> It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control, or in any wise hinder the prosecution of the war.

Even, however, without the benefit of the Director General's views on the fourth section, it is impossible to conceive how the Commission could have supposed for a moment that anyone would seriously contend that the enforcement of the fourth section could "interfere with unified, coordinated national control."

On the other hand, the enforcement could conceivably "hinder the prosecution of the war," by depriving the Director General of essential revenues. The Commission, however, not only does not attempt to deny, but even fails to mention, that at least a conceivable, or, as has been shown here, an inevitable, result of the enforcement of section 4 against the Director General would be to deprive the President of the unrestricted power conferred upon him by section 10 of the Federal Control Act to initiate rates by merely filing them.

In fact, the only portion of the Commission's opinion which does not afford its own answer is the last sentence quoted above. Superficially it might seem that since Congress in the Federal Control Act specifically provided that—

> said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination—

and thereby expressly exempted the Director General from the power the Commission had under section 15 of the Interstate Commerce Act to suspend rates published by a carrier, Congress would, had it intended to set aside the provision of section 4 of the Interstate Commerce Act as against the Director General, have provided like specific exemption. That no such deduction is justified, however, readily appears when it is understood that the power of the Commission to suspend rates already initiated would still have been consistent with the unrestricted power in the Director General to initiate rates by merely filing

them. Therefore it was necessary for Congress, if the Commission were not to exercise its power to suspend under section 15 of the Interstate Commerce Act as against the President, to exempt the President expressly from the Commission's power in this respect. On the other hand, it was unnecessary, and would have been superfluous, to exempt the President expressly from the requirement of section 4 that application must be made to the Commission for relief from the provisions of the fourth section before lawful rates could be filed involving departures from the provisions of that section, since this was inevitably in conflict with the unrestricted power conferred upon the President under section 10 of the Federal Control Act to initiate rates by merely filing them with the Commission.

The Director General, therefore, submits that, for the reasons specified in this brief, as well as for the additional reasons furnished by the brief heretofore filed in his behalf, this court should reverse the judgment of the Circuit Court of Appeals.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Petitioner.

WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further*, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

* * * * *

FOURTH SECTION ORDER NO. 7316—GENERAL NO. 17.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 27th day of May, A. D. 1918.

Whereas, The President of the United States, through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General:

And Whereas, The said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provision of section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules containing rates, fares, charges, or classifications

containing departures from aforesaid provisions of section 4, enabling carriers under federal control in the present emergency to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918:

It is ordered, That in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges, and classifications which exceed the aggregate of the intermediate rates, fares, charges, and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges, and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce.

And it is further ordered, That carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges, and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director

General without observing the provisions of the fourth section of the act to regulate commerce.

It is further ordered, That this order shall supersede and take the place of any provision or provisions of any fourth section order or orders heretofore issued that may be in conflict herewith.

The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges, and classifications being subject to complaint, investigation, and correction if in conflict with any provision of the act.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

O

FILED
SEP 20 1923
WM. R. STANSBURY
CLERK

No. 114

In the Supreme Court of the United States

JAMES C. DAVIS, Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY, a corporation,
Respondent.

On Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

JAMES C. DAVIS, Agent, United States Railroad Administration,

Petitioner,

vs.

THE PORTLAND SEED COMPANY, a corporation,

Respondent.

On Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit

STATEMENT OF CASE

During December, 1918, and January, 1919, two shipments of alfalfa seed were delivered to the Director General of Railroads at Roswell, New Mexico, consigned to Yakima, Washington, and Walla Walla, Washington, respectively, on shipper's order bills of lading. These bills of lading were subsequently endorsed to Portland Seed Company, defendant in error, which paid $1311.75 freight charges on the Yakima shipment and $715.79 freight charges on the Walla Walla shipment and took delivery of the shipments. The route of the shipments was over the lines of the Atchison, Topeka & Santa Fe Railroad Company to Denver; thence over Union Pacific Railroad to Granger, Wyoming; thence over Oregon Short Line Railroad Com-

pany to Huntington, Oregon, and thence over Oregon-Washington Railroad & Navigation Company to destinations. All of these lines at the time were under federal control. The charges paid were based on the published tariff rate of $2.44 per hundred weight.

At the time the shipments moved there was on file a through tariff from Pecos, Texas, to Walla Walla and Yakima, Washington, naming a rate of $1.51½ per hundred weight on alfalfa seed. Pecos is more distant from Walla Walla and Yakima than Roswell. The Seed Company instituted suit for the excess of the Roswell rate over the Pecos rate on the theory that the Pecos rate was in violation of the long and short haul clause (Section 4), of the Interstate Commerce Act.

The theory of the complaint is that the difference between the Roswell rate and the Pecos rate was an overcharge illegally exacted and recoverable as money had and received. There was no allegation or evidence of any damage other than the allegation and proof that the Seed Company paid the Roswell rate which was higher than the Pecos rate. No evidence was offered that any shipments of alfalfa seed had ever moved from Pecos to either Walla Walla or Yakima, that alfalfa seed was raised in or around Pecos, or that any competitor of the Seed Company or of the shippers from whom the Seed Company purchased had been benefited in any way by the difference in rates from the two points.

A demurrer challenging the jurisdiction of the court was filed and overruled. The Director General thereupon answered admitting the shipments, the payment of the charges, the existence of the tariff naming the lower rate from Pecos, the fact that Pecos was a more

distant point over the same route than Roswell, but denying that the Director General had not received authority from the Interstate Commerce Commission to charge higher rates from Roswell than from Pecos. A trial before the court without a jury resulted in a judgment for the difference between the rates with interest, costs and attorney's fees. The judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (281 Fed. 10), and is brought here on Writ of Certiorari.

POINTS AND AUTHORITIES

I.

The District Court was without jurisdiction, exclusive original jurisdiction being lodged in the Interstate Commerce Commission.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.

Robinson vs. Baltimore & Ohio R. Co., 222 U. S. 506.

Mitchell Coal & Coke Co. vs. Pennsylvania R. Co., 230 U. S. 247.

Morrisdale Coal Co. vs. Pennsylvania R. Co., 230 U. S. 304.

Texas & Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138.

Northern Pacific Ry. vs. Solum, 247 U. S. 477.

Director General vs. Viscose Co., 254 U. S. 498.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Pennsylvania R. Co. vs. Puritan Coal Co., 237 U. S. 121.

Pennsylvania R. Co. vs. Sonman Coal Co., 242 U. S. 120.

St. Louis etc. R. R. Co. vs. Hasty, 255 U. S. 252.

II.

Section 4 of the Interstate Commerce Act, (the long and short haul clause), is a statute relating to a form of discrimination and not one merely declaring the intermediate rate unlawful.

Parsons vs. C. & N. W. Ry. 167 U. S. 447.

Fourth Section, Interstate Commerce Act.

III.

Discrimination may be removed either by raising one rate, lowering the other, or changing both, and the fact that a rate discriminates against one locality in favor of another one does not in itself entitle the first locality to the same rate as the tariff provides for the second.

American Express Co. vs. Caldwell, 244 U. S. 617.

St. Louis etc. Ry. Co. vs. U. S. 245 U. S. 144.

Hillsborough Mills vs. Boston & Maine R., 269 Fed. 816.

IV.

Section 6 of the Interstate Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. In view of this section

the carriers were compelled to collect their published rates or refuse to accept the commodities for shipment.

Section 6, Interstate Commerce Act.
Section 4, Interstate Commerce Act.

V.

Under Section 6 the carriers must collect their published rates, even though they are violative of other sections of the Act.

Armour Packing Co. vs. U. S. 209 U. S. 56.

P. C. C. & St. L. vs. Fink, 250 U. S. 577.

Keogh vs. C. & O. R. R. Co., 43 Supreme Court Reporter, 47.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Poor Grain Co. vs. C. B. & Q. R. Co., 12 I. C. C. 418.

Interstate Remedy Co. vs. American Express Co., 16 I. C. C. 436.

Crescent Coal & Mining Co. vs. C. & E. I. R. Co. 24 I. C. C. 149.

VI.

Under plaintiff's theory that the rate from Roswell was not a legally published rate, there was no legally published rate at all—the transportation must therefore have been unlawful, and the courts will not aid shippers in collecting any part of the charges which they paid.

Payne vs. Bassett, 235 S. W. 917.

VII.

The mere fact that a rate is violative of the long and short haul clause of the Interstate Commerce Act does not entitle shippers to an intermediate point to recover the excess over the rate to the more distant point.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.
International Coal Co. vs. Pennsylvania R. Co., 230 U. S. 184.
Iten Biscuit Co. vs. C. B. & Q. R. Co., 53 I.C.C. 729.
Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

VIII.

The long line of decisions of the Interstate Commerce Commission in Fourth Section violation cases holding that mere proof of the difference in the rates is no evidence of damage, should be followed by this court, because not manifestly incorrect.

Heath vs. Wallace, 138 U. S. 573.
U. S. vs. Cerecedo, 209 U. S. 337.

IX.

Section 10 of the Federal Control Act, and the Transportation Act of 1920, lodged exclusive original jurisdiction of cases against the Director General involving violations of the Interstate Commerce Act in the Interstate Commerce Commission.

Section 10, Federal Control Act, 40 Stat. L. 451.
Northern Pacific R. Co. vs. North Dakota, 250 U. S. 135.

Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6.

Transportation Act of 1920, Section 206 (e) 41 Stat. L. 462.

25 R. C. L. 1010.

Phillips vs. Grand Trunk Ry., 236 U. S. 662.

Kansas City Sou. R. Co., vs. Wolf, 43 Supreme Court Reporter, 259.

Mo. Pac. R. Co. vs. Ault, 256 U. S. 554.

X.

No violation of the Fourth Section was proved, because the evidence showed that there was no transportation from the more distant point, the rate being merely a paper rate.

Section 4, Interstate Commerce Act.

Parsons vs. C. & N. W. Ry., 167 U. S. 447.

Judson on Interstate Commerce, 3rd Ed. page 529.

Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

Anaconda Copper Mining Co. vs. Director General, 64, I.C.C. 136.

Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487.

XI.

During Federal control rates were initiated and maintained under order of the President, and the Fourth

Section of the Commerce Act was therefore inapplicable to them.

Section 10, Federal Control Act, 40 Stat. L. 451.

Northern Pacific Ry. vs. North Dakota, 250 U. S. 135.

Missouri Pacific R. Co. vs. Ault, 256 U. S. 554.

Alabama, etc. R. Co. vs. Journey, 42 S. C. R. 6.

XII.

If there was a departure from the Fourth Section it was covered by appropriate orders of the Commission.

Interstate Commerce Commission, Fourth Section Orders 7316 and 7601.

XIII.

The measure of damages in Fourth Section cases is not the difference between rates.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.

Pennsylvania R. Co., vs. International Coal Co., 230 U. S. 184.

Hillsborough Mills Co. vs. Boston & Maine R. Co., 269; Fed. 816.

Homestead Coal Co. vs. Des Moines Elec. Co., 226 Fed. 49.

Atchison etc. R. Co. vs. Spiller, 246 Fed. 1, 20.

Clark Bros. Coal Mining Co. vs. Pennsylvania R. Co., 238 Fed. 642.

Lehigh Valley R. Co., vs. American Hay Co., 219 Fed. 539.

ARGUMENT.

THE DISTRICT COURT HAD NO JURISDICTION. EXCLUSIVE ORIGINAL JURISDICTION OF THIS CLASS OF CASES WAS LODGED IN THE INTERSTATE COMMERCE COMMISSION BY THE COMMERCE ACT, AND AS TO CLAIMS AGAINST THE DIRECTOR GENERAL BY THE FEDERAL CONTROL ACT AND THE TRANSPORTATION ACT.

The extent of the exclusive original jurisdiction of the Interstate Commerce Commission has been before this court in numerous cases. Before Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, the courts seemed to have entertained all classes of cases involving violations of the Commerce Act. In that case, however, it was pointed out that exclusive initial jurisdiction was lodged in the Interstate Commerce Commission in all cases where a scheduled rate is attacked, and that when a rate is once established in a tariff carriers are bound by law to collect it until changed by the Commission.

In Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, it was held that the method or rule of distribution of cars adopted by a carrier can only be attacked before the Commission and that the courts are without jurisdiction of such cases.

In Robinson vs. Baltimore & Ohio R. R. Co., 222 U. S. 506, a rate was attacked as discriminatory. It

was held that the courts were without jurisdiction since this involved an attack upon a scheduled rate.

In Mitchell Coal & Coke Co. vs. Pennsylvania R. R. Co., 230 U. S. 247, jurisdiction was denied to the courts of a suit for damages by reason of the payment by a carrier of unreasonable amounts for service performed by some shippers, while refusing to make similar payments to others.

In Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304, the courts were again denied jurisdiction of suits for damages based on allegations that the rule of car distribution adopted by a carrier was discriminatory.

In Texas and Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138, jurisdiction was denied the courts of a suit to determine whether rates in a lumber tariff applied to cross ties.

In Northern Pacific Ry Co. vs. Solum, 247 U. S. 477, jurisdiction was denied the courts of a suit for damages against a carrier for routing shipments, in the absence of direction by the shippers, over the more expensive of two possible routes. The following succinct statement of the rule requiring preliminary determination of administrative questions by the Commission was made in that case:

> "It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

In Director General of Railroads vs. Viscose Co., 254 U. S. 498, jurisdiction was denied to the courts of a suit enjoining the Director General from cancelling a

tariff on raw silk and adding that commodity to the articles "that will not be accepted for shipment". The concluding sentence of the opinion is illuminating:

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (citing numerous decisions), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative."

On the other hand, in Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, jurisdiction of the courts was sustained in a suit for damages based on a carrier's giving rebates from the scheduled rates to a shipper's competitor; in Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S. 121, and Pennsylvania R. R. Co. vs. Sonman Coal Co., 242 U. S. 120, it was held the courts had jurisdiction of suits for damages on account of failure to furnish cars, there being no shortage of cars involved and no attack being made upon the rule of distribution adopted by the carrier; in St. Louis, etc., R. R. Co. vs. Hasty, 255 U. S. 252, this court interpreted a tariff where the matter was so free from doubt that it considered there was no occasion to apply to the Commission for a construction.

The distinction between the two classes of cases is obvious. In the one, scheduled rates or rules adopted by the carrier are attacked on one ground or another; in the other, no attack is made upon the schedules or rules of the carrier, but some departure from them or

some matter unconnected with the schedules or rules is involved. In the one the uniformity sought by the Commerce Act necessitates a finding by a competent tribunal for the benefit of all shippers similarly situated and binding upon them; in the other there is involved merely a controversy which concerns only a carrier and a particular shipper, and the finding of a court does not bind or directly benefit other shippers; in the one examination of the schedules and rules of the carrier by a specially equipped tribunal is necessary to full relief, and in the other the schedules and rules of the carrier are, for the purposes of the litigation, conclusively presumed legal.

Plaintiff recognizes these principles, but asserts that he is not attacking a legally published rate; that a rate to an intermediate point higher than to a more distant point, even though actually published in a tariff, is never legally published. He assumes that the other rates named in the tariff are legally published rates and that the rate to the more distant point automatically becomes the rate to the intermediate point.

But this is in direct contradiction to the provision of Section 4 that the prohibition against charging more for the short haul than the long "shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance".

Section 6 (Paragraph 7) of the Commerce Act is as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this

> Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It follows that if the rate to an intermediate point is not the legally published rate there is no legally published rate and the carrier cannot legally transport the commodity, nor the shipper permit it to be transported to the intermediate point. It is no answer to say that the rate to the intermediate point provided by the tariff previously in effect would govern, since the carriers have cancelled that tariff. In addition, the higher rate to the intermediate point might arise from a reduction of the rate to the more distant point, in which case, under plaintiff's theory, the intermediate rate would immediately become illegal and there could be no published rate. Under plaintiff's theory, therefore, the sugar shipped by his assignors was shipped illegally because there were no rates published to cover the movement.

In this situation, the doctrine of Payne vs. Bassett, 235 S. W. 917, that there can be no recovery for damage to commodities transported in interstate commerce when there is no legal published rate to cover the movement, is applicable also to a recovery of all or part of the charges collected. The carrier by transporting and

the shipper by shipping and paying the charges must be held to have made and performed an illegal contract, from the consequences of which the law will not relieve either of them.

But plaintiff's theory, we believe, misinterprets the plain meaning of Section 4. That section is not directed solely against the rate for the short haul, but against relation between the rates to the intermediate point and the more distant point. It is true, the section declares it unlawful to charge more for the short haul than for the long, but the meaning would have been the same had the prohibition been against charging less for the long haul than for the short.

Section 3 of the Act relates to discrimination in general and Section 4 to one form of discrimination. This is demonstrated by the opinion of this court in Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447. That was an action for alleged violation of the long and short haul provision of Section 4 of the Commerce Act. It was decided in 1897 before the amendments which gave force to the Commerce Act and real power to the Commission, and before the decision of Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, which first announced the doctrine that the courts were without jurisdiction of matters intrusted to the Commission by the Commerce Act. No question of the jurisdiction

of the court seems to have been raised. The following observations of the court at page 454 clearly define the nature of Section 4:

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant."

If Section 4 is a prohibition against one specific type of discrimination, a matter of relativity of rates, then the difference between the rates for the short haul and the long is not the measure of damages. In American Express Co. vs. Caldwell, 244 U. S. 617, a suit involving discrimination between intrastate and interstate rates, this court made the following observations at page 624:

> "1. The nature of the Interstate Commerce Commission's order.
>
> "In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other

until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the Express Companies, both to maintain their interstate rates and to raise, to their level, the intrastate rates involved. The Shreveport case (Houston, East & West Texas Ry. Co. vs. United States), 234 U. S. 342. For, if the interstate rates are maintained, the discrimination can be removed only by raising the intrastate rates.

"But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."

In St. Louis etc. Ry. Co. vs. U. S., 245 U. S. at page 144 this further statement is found:

"Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do

not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. American Express Co. vs. Caldwell, 244 U. S. 617, 624."

To the same effect is Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816.

Section 1 of the Commerce Act forbids unreasonable rates; Section 2, the charging of greater or less compensation to one person than to others; Section 3, undue preference of and discrimination against persons and localities, and Section 4, charging more for a short haul than for a long haul. There are no degrees of unlawfulness created by these sections. It is as unlawful under the Act to charge unreasonable rates or to charge more or less to one person than to others, or prefer or discriminate against a person or locality, as it is to violate the long and short haul clause.

Section 6 requires carriers to publish schedules of their rates, to collect from all shippers the charges named in the schedules and no other. Since rates may be published which are unreasonable or otherwise in violation of one or more of the first four sections of the Act, there is an apparent conflict between Section 6 requiring collection of the published rates and the other sections forbidding the collection of unreasonable, preferential or discriminatory rates, or rates which violate the long and short haul clause.

This conflict has been recognized by this court in several decisions and by the Interstate Commerce Commission in numerous decisions. In Armour Packing Co. vs. U. S., 209 U. S. 56, a rebating case in which an agreement was made between several shippers and carriers for rates lower than those named in the published tariffs, this court clearly stated the binding effect of published rates. We quote from page 80, et seq.:

> "It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.
>
> In the Elkins Act Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of

contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

In P. C. C. & St. L. Ry. vs. Fink, 250 U. S. 577, an action for an undercharge, this court said at page 581:

"The purpose of the act to regulate interstate commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments

of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure."

In Keogh vs. C. & O., 43 Supreme Court Reporter 47, decided November 13, 1922, a suit for damages under the Sherman Anti-trust Act, based on alleged excessive rates maintained by a carrier, the binding effect of a published rate was restated in the following language:

> "Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff can not be varied or enlarged by either contract or tort of the carrier."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, an action for the difference between the published rates paid by a shipper and the lower rates charged his competitor, a case to which we shall later refer on the subject of damages, this court at page 196, et seq., made the following clear statement of the effect of Section 6:

> "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was un-

lawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. Armour Co. vs. United States, 209 U. S. 56, 83.) The tariff, so long as it was of force, was in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

The Commission in its decisions holding Section 6 paramount over other sections of the Act, has adopted the term "legal rate" as synonymous with the published

rate and the term "lawful rate" as meaning a rate which does not violate any of the other sections of the act.

In Poor Grain Co. vs. C. B. & Q. Ry. Co., 12 I. C. C. 418, we find the following in the opinion of the Commission at page 423:

> "The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points, and that it shall be unalterable by any act or omission by the carrier or the particular shipper, or in any manner other than that provided by law."

And again at page 424 et seq:

> "Besides the issues hereinbefore adverted to, reparation is demanded on another ground that lends further emphasis to the question here under consideration of the fixedness and inflexibility of a published rate. A rate may be lawful in the sense that it is the regularly published rate and therefore the only rate under which traffic may lawfully move, and yet at the same time be unlawful in the sense that it is excessive and unreasonable in amount. Its lawfulness as the published rate is to be tested by the mere inspection of the schedules on file with the Commission, and if found to have been published in conformity with the requirements of law that rate must in all cases be charged and actually collected by the carrier even though it may be excessive. Whether or not it is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as

having a legitimate influence in rate making. But in no event may a carrier agree with a shipper that the published rate, under which shipments have been made, is too high and undertake to adjust it by collecting a less rate. *The publication fixes and makes the rate inflexible and unalterable,* as heretofore explained, *and that rate must be applied until changed in the manner required by law.* Nor may a carrier, when a rate has been duly canceled and a lower rate made effective, voluntarily refund from the freight charges already collected, and thus give the benefit of the new rate on shipments that moved under the previous higher rate. This Commission alone has jurisdiction to authorize a refund to be made from the charges collected on previous shipments. And it can give such authority only upon an affirmative finding that such rate was excessive and unreasonable, and therefore unlawful. The complainant appeals to that jurisdiction in this petition. (Italics ours.)

In Interstate Remedy Company vs. American Express Co., 16 I. C. C. 436, the Commission restated the proposition thus at page 4:

"But even if it should eventually be held that a carrier may not lawfully make a lower rate upon a return shipment than would apply if it were an original shipment, we are of opinion that *the carrier may not plead the unlawfulness of its tariff to avoid extending the benefit thereof to a shipper.* While it has been repeatedly emphasized by the Commission that the shipper is put upon notice of a rate by the publication of the tariff, *it has not been held*

that a shipper must determine for himself the lawfulness of a rate, regulation, or practice, upon his peril. The responsibility rests upon the carrier to have lawful rates and rules in effect, and *every shipper may with safety rely upon such rates without fear that they will be withdrawn as illegal after he has made shipment thereon, resting in the confidence that they are lawful so long as they are in force.* If subsequently found to be unlawful, the carrier is subject to penalty for the institution and maintenance of such rates or rules, but *the law does not contemplate that the shipper shall move upon any other theory than that the provisions of the carrier's tariff are in full compliance with the law's demands.*" (Italics ours.)

In Crescent Coal & Mining Co. vs. C. & E. I. R. R. Co., 24 I. C. C. 149, the effect of Section 6 is again stated. We quote at page 156:

"The sole question to be determined is the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate under other sections of the act with its *legality* under section 6. *For example, a rate unreasonably high and unlawful in the sense of Section 1 may, nevertheless, be the legally established standard and rule of action under Section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute.* This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether knowingly in the usual course

or inadvertently or for collusive or other improper purposes. * * * In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk-line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; *and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations.* In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * * * *

This application of the statute to these facts is not a technical one, but is imperative, not only be-

cause in conformity with the strict letter of the law but with the only construction which will preserve the chief function of section 6, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them." (Italics ours.)

These authorities demonstrate that it was the duty of the carriers in the instant cases to collect the published charges, even though such charges were violative of Section 4, a question later to be discussed; that if there was a violation of the Fourth Section it was a form of discrimination which the carriers could remove voluntarily by lowering the short haul rate, raising the long haul rate, or by changing both rates in such manner as to correct the violation; or, on the other hand, the Commission might order the carriers to remove the violation by resorting to any one of these three expedients; that the Fourth Section specifically provides that it shall not be interpreted as authorizing the charging of as much for a short haul as for a long; that courts are powerless to fix rates, this being an administrative function committed to the Commission, and that the only way in which the rate to be charged to an intermediate point can be determined, in the absence of voluntary action by the carriers, is through the Commission.

So we find the decisions of the Interstate Commerce Commission full of cases involving violations of Section 4 of the Act, and such cases absent from the court reports until the decision of the Circuit Court of Appeals in this case resulted in the filing of a large number of similar cases in the courts. The Commission has con-

sistently held that the mere fact of a Fourth Section violation does not give a shipper who pays the intermediate rate, a right of action for the difference between that rate and the rate to the more distant point, and that there may be no damage, or the damage may be more or less than the difference in rates. These decisions of the Commission are so numerous that regard for the length of this brief forbids listing them all. Several such cases are found in almost every recent volume of the Interstate Commerce reports.

A typical case is Iten Biscuit Co. vs. C. B. & Q. R. R. Co., 53 I. C. C. 729. The following quoted from the opinion at page 731 et seq. is illustrative:

> "With respect to the Fourth Section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the Fourth Section is absolute, the collection of higher charges from and to Omaha was unlawful per se, and the excessive charges must as a matter of law be refunded."

The opinion then discusses the cases of Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, and So. P. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, and then goes on as follows:

> "But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable per se and

> the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and to consequent damage. In this instance, as we have already seen, there is no such proof."

This construction of the Fourth Section was adopted by the Commission as early as 1908 as is evidenced by Topeka Banana Dealers' Association vs. St. L. etc. R. Co., 13 I. C. C. 620, 627, decided in that year, and has been reannounced so frequently by the Commission that it should be followed by the courts unless manifestly incorrect. Heath vs. Wallace, 138 U. S. 573; U. S. vs. Cerecedo, 209 U. S. 337.

It is an inevitable conclusion from these authorities that before federal control initial jurisdiction of cases involving violations of the Fourth Section of the Commerce Act was lodged exclusively in the Interstate Commerce Commission; that the courts were without power in the event of such a violation to fix the rate to be charged to or from the intermediate point, and consequently without jurisdiction of claims for the difference between the rates to or from a more distant point and to or from an intermediate point. But it is even clearer that the courts have no jurisdiction of such claims when made against the Director General.

EFFECT OF FEDERAL CONTROL ACT ON JURISDICTION OF COURTS

Section 10 of the Federal Control Act, 40 Stat. L. 451, reads in part as follows:

> "Section 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such federal control or with any order of the President. * * *
>
> That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.
>
> Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under federal control, and may consider all the

facts and circumstances existing at the time of making the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said findings and certificate by the President, together with such recommendations as he may make."

It will be noted from the foregoing that the Director General, the agent of the President, was not made unqualifiedly subject to all laws, state and federal, but only in so far as those laws were not inconsistent with the Federal Control Act and any order of the President.

It appears from the complaint that at the beginning of federal control the Director General found the published rates from Roswell to Walla Walla and Yakima to be higher than the corresponding rates from Pecos; that he continued them in effect until June 25, 1918, and on that date by General Order No. 28 he increased the rates, along with other rates throughout the United States, by twenty-five (25%) per cent. These were obviously orders of the President and insofar as existing laws, either state or federal, were inconsistent with the orders they were of no effect.

Northern Pacific Ry. Co. vs. North Dakota, 250 U. S. 135, arose from the allowance by a state court of a peremptory writ of mandamus commanding the Director General of Railroads to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the Director General, and to collect only the lesser rates fixed in the tariffs on file with the Public Utilities Commission of the State. Under the laws of North Dakota such rates could not be changed without the approval of the Utilities Commission. This court reversed the Supreme Court of North Dakota, and explained the effect of Section 10 as follows:

> At page 143. "By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority 'until and

except so far as said Director shall from time to time by general or special orders otherwise provide.' Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: 'But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such.' "

And at page 148:

"No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other

duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of Section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: 'That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.' These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute."

In Missouri Pacific vs. Ault, 256 U. S. 554, the court held inapplicable to the Director General a statute of a state providing a penalty for the failure by a railroad Company to pay promptly the wages of discharged employes.

In Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6, decided by this court November 7, 1921, General Order No. 18, issued by the Director General, prescribing the venue of suits, was upheld as against the statutes of Mississippi on the same subject, attention being called to the fact that Section 10 of the Federal Control Act "permitted enforcement of liabilities against carriers while under federal control only 'in so far as not inconsistent * * * with any order of the President.' "

The provision of Section 10 limiting the application of statutes to cases in which the statutes are not "inconsistent with any order of the President" refers specifically to federal laws as well as state laws and the common law. It subjects to this limitation Section 4 of the Interstate Commerce Act, and, indeed, the whole Interstate Commerce Act, except as the limitation is itself limited by the provisions in the last two paragraphs of Section 10, giving the Interstate Commerce Commission power to inquire into the justness and reasonableness of orders fixing rates, classifications, regulations and practices, and after full hearing to make such findings and orders as are authorized by the Commerce Act. It follows, therefore, that the rates maintained by the Director General were not subject to attack and are not now, except before the Interstate Commerce Commission.

EFFECT OF TRANSPORTATION ACT OF 1920

The Transportation Act of 1920 (Section 206 (a)-(g), 41 Stat. L. 461) contains the consent of the United States to be sued on causes of action and claims arising during federal control of railroads. Section 206 (a) is a general section giving the right to bring actions, suits and proceedings in admiralty against an agent designated by the President in any court, which, but for federal control, would have had jurisdiction of the cause of action had it arisen against a carrier.

Paragraph (b) relates to service of process. Paragraph (c) is as follows:

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under sub-division (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complants in the manner provided in

the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a)."

Paragraph (e) provides that final judgments, decrees and awards shall be paid out of a revolving fund created by other sections of the Act.

By an Act approved February 24, 1922 (42 Stat. L. 393), Paragraph (a) was amended by adding a limitation of one year after the date of the Commission's award for the filing of actions to enforce such awards. The same Act amended Section (c) by extending the time within which claims for overcharges above the legal tariff charge could be filed with the Commission, to two years and six months.

Section 206 (a) is a general consent to be sued and is, of course, necessarily comprehensive in its terms. Section 206 (c) is, however, equally comprehensive in its own field. It covers every question which could arise out of the Interstate Commerce Act, and affords a complete remedy for any and all violations of that Act. Therefore, under elementary rules of statutory construction the particular part of the field covered by Section 206 (c) is taken out of the operation of Section 206 (a).

25 R. C. L. 1010:

"250. General and Particular Provisions.—It is an old and familiar rule, which is closely related to the doctrine of ejusden generis, and to the rule that where an act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act, that where

there is in the same statute a particular enactment, and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

Furthermore, the actions and suits authorized by Section 206 (a) might be brought within the varying periods of limitations found in state statutes, subject to a maximum limitation of two years from the termination of federal control, whereas, a uniform limitation of one year, except as to undercharges was placed by Section 206 (c) on proceedings before the Commission. This court in Phillips vs. Grand Trunk Ry., 236 U. S. 662, has held uniformity one of the principal objects of the Commerce Act, and that the requirement of the act that all shippers be treated alike necessitates a ruling that they are bound by the same statutes of limitation whether they bring their cases before the Commission or the courts. The same doctrine was reaffirmed in Kansas City Sou. R. Co. vs. Wolf, 43 Supreme Court Reporter, 259. If, under the Transportation Act, a shipper may elect to bring an action for a violation of the Fourth Section in a court or before the Commission, the period of limitation applicable to his cause of action depends upon the forum which he chooses and uniformity is gone.

THERE WAS NO VIOLATION OF SECTION 4 BECAUSE NO SHIPMENTS FROM PECOS WERE PROVED.

So far as the evidence discloses the rate from Pecos to Walla Walla and Yakima was a mere paper rate, one that had never been used. It may have constituted an offer by the Director General to shippers, but there is no proof that the offer was ever accepted.

Section 4 provides that "it shall be unlawful for any common carrier * * * to *charge* or *receive* any greater compensation in the aggregate *for the transportation* * * *, of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." The words "charge" or "receive" "for the transportation" carry with them the implication that actual shipments shall be involved. No cause of action is given to anyone merely because unlawful rates are carried in a tariff. To give ground for complaint, a charge must have been made and collected on an actual shipment to the intermediate point.

Of course, the words "charge or receive for transportation" can have no different meaning in respect of shipments to the more distant point than as to those to the intermediate point. A carrier can not "receive" more for the short haul than the long, without actually collecting charges for both. Likewise, if it has not "charged" for the short haul until an actual shipment has moved and payment of the rate been made or at least demanded, it can not "charge more" for a short haul than for a long haul until it has collected or de-

manded charges for actual shipments to both places involved. Again, the inhibition of the Section is against charging or receiving *"for the transportation* * * * of like kind of property for a shorter than for a longer distance." There was no transportation to the more distant point and therefore there was neither charging nor receiving for it.

This interpretation of the Section has the support of Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447—a Fourth Section case to which we have previously referred, wherein it is stated at page 454 that "the burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. * * * So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials, shippers in Nebraska had been given a lesser rate. * * *"

"It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of the railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another."

Judson, on Interstate Commerce, 3rd Edition, p. 529, in discussing Section 8 of the Act, states: "A discriminating rate must be actually charged to make an offense or cause of action under the Act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487; E. Dist. of Penn. (1902)."

The Commission has given the Section a similar interpretation. In Topeka Banana Dealers' Association vs. St. L. S. F. R. R. Co., 13 I. C. C. 620, 627, a Fourth Section case, the Commission held, "The complaint here is that bananas moved from New Orleans through Kansas City to Burlington, Iowa, and that the Kansas City rate is higher than that to Burlington. There is a joint rate quoted in the tariffs to Burlington via Kansas City, but no bananas seem to have ever moved over that route. It is nothing more than a paper rate, bananas destined for Burlington moving through St. Louis."

In Anaconda Copper Mining Co. vs. Director General, 64 I. C. C. 136, 139, the Commission said: "Prior to August 31, 1920, the rates to Rome were not in accordance with the long-and-short-haul provision of the Fourth Section. The rate to Utica was neither charged nor collected and complainant made no attempt to prove damage by reason of the collection of higher rates to Rome. Following Iten Biscuit Company vs. C. B. & Q. R. R. Co., 50 I. C. C. 724; 53 I. C. C. 729, no award of reparation can be made."

In Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487, the District Judge of the Eastern District of Pennsylvania, referred to the effect of paper rates in the following language:

> "For present purposes it must be assumed that the rate complained of was discriminating, but I still think that a mere paper rate, which is never carried into effect, and is therefore simply a proposition to carry for a specified sum, is not such a violation of the interstate commerce act as to prevent the carrier from recovering freight from other

than the theoretically favored shippers. It is discrimination in fact, and not a mere intention to discriminate, that is punishable; and in the case before the court there was no evidence that a pound of coal had been carried to be sold in the market by any other shipper than the defendants. Hence no rival of the defendants was benefited by the unaccepted rate, and no harm was done to their business."

During Federal control rates initiated and maintained by the Director General were under "Order of the President." All statutes, State or Federal, insofar as inconsistent with such orders, were, by Section 10 of the Federal Control Act, made inapplicable. Section 4 of the Commerce Act, like any other statute, was therefore not effective as against the Director General's rates. We have previously quoted from Northern Pacific vs. North Dakota, 250 U. S. 135; Missouri Pacific vs. Ault, 256 U. S. 554, and Alabama etc. Ry. vs. Journey, 42 S. C. A., 6, to that effect. It follows there was no violation of Section 4 during Federal control.

THE DEPARTURES, IF ANY, FROM THE FOURTH SECTION WERE AUTHORIZED BY THE INTERSTATE COMMERCE COMMISSION

The Commission's Fourth Section Order 7316, dated May 27, 1918, granted authority to the Director General to charge more for the short haul than for the long, whenever General Order No. 28 was in conflict with the Fourth Section. The *second* and *third* paragraphs of *this order* are as follows:

> "And whereas the said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provisions of Section 4 of the act to regulate commerce as will permit said carriers under Federal control to file schedules containing rates, fares, charges, or classifications containing departures from aforesaid provisions of Section 4, enabling carriers under Federal control, in the present emergency, to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918:
>
> *It is Ordered:* That in those instances in which carriers under Federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under Federal control, higher rates, fares, charges, and classifications for shorter

than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges and classifications which exceed the aggregate of the intermediate rates, fares, and charges, and classifications, as set forth in General Order No. 28 of the Director General the said carriers be, and they are hereby authorized to establish such rates, fares, charges and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce."

That this was intended to apply to Fourth Section departures previously existing, is evidenced by the Commission's Fourth Section Order 7601 of March 1, 1920, which reads in part as follows:

"The question of the relief granted by Fourth Section Order 7316, General No. 17, being under consideration; and

It appearing that the relief granted by the said order applied to all rates, fares, charges and classifications increased in pursuance of General Order No. 28 of the Director General of Railroads, including those which theretofore conformed to the

provisions of the Fourth Section and those not in accord therewith not authorized by orders of this Commission or protected by appropriate Fourth Section application for relief."

THE MEASURE OF DAMAGES IS NOT THE DIFFERENCE BETWEEN THE RATES. NO OTHER EVIDENCE OF DAMAGE WAS OFFERED SO THERE CAN BE NO RECOVERY.

On the subject of damages plaintiff offered no evidence other than the fact that it had paid the published charges from Roswell on the shipments set up in the complaint. Its theory is that the excess of the Roswell rate over the Pecos rate constitutes an overcharge above the legally published rate, and that having established the fact that it paid the excess it is entitled to recover it without other proof of damage.

This contention is refuted by Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, several federal decisions, and a long list of decisions by the Interstate Commerce Commission.

In Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, a Fourth Section case, this Court pointed out that the mere difference in rates is not evidence of damage. We quote at page 459:

> "But these 'might be's' interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made any arrangement with any consignee in any of those points for the receipt and sale of his corn, or even that the extra commissions there would not more

than make the difference in rates. In short, he does not allege either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges might be absolutely and fully true, and yet he, with the knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago. Surely it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong; for, if he would not under any circumstances have shipped to New York, was compelled by his contracts or any other consideration to ship to Chicago, he cannot say that he was injured by his ignorance of the rate to New York. The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act'. So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and had been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum

he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, there was before the court an action for damages for the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed to plaintiff's competitors. There was no allegation or proof that plaintiff had been damaged except that he paid higher rates than his competitors. This court at page 198 stated plaintiff's contention and commented on it as follows:

> "It contends, however, that this was not necessary for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route. And such a right of action was expressly given in Section 2 of the original Bill to Regulate Commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier 'shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.'
>
> The fact that this provision measuring the amount of recovery by rebate was omitted from

the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes —not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that Section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States v. Freight Association*, 166 U. S. 290, 318; *Maxwell v. Dow*, 176 U. S. 581, 601. Section 2 of the original Senate Bill said nothing about *damages* but in the case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Section 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to 'the person injured'—and, of course, to the extent of the injury."

Again at page 202:

"For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharges, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it

had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under Section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be *'liable to the person injured thereby for the full amount of damages sustained in conse-*

*quence of such violation, * * * together with reasonable attorney's fee.'* In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899."

In Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816, (District Court of Mass.) plaintiff, after securing a finding by the Commission that the absorption of certain switching charges to certain docks used by plaintiff's competitors without a corresponding absorption of charges for switching to the dock used by plaintiff, was discriminatory, brought suit for the excess of the rates he had to pay over those paid by his competitors. After a review of the decisions of this court on the subject, the court held:

"The plaintiff paid no more than it was legally obliged to pay. There may have been disadvantages in using the Commonwealth Dock which more than offset the saving in transportation charges from it. Everything considered, it may have been as profitable to import over the National Dock and pay the switching charges, as over the Commonwealth Pier and not pay them. If so, the plaintiff's competitors, who used the Commonwealth Pier, gained no advantage by so doing, and the plaintiff sustained no damage because of the unlawful rate accorded them."

To the same effect are Homestead Coal Co. vs. Des Moines Electric Co., 226 Fed. 49; Atchison, etc., R. Co. vs. Spiller, 246 Fed. 1, 20; Clark Bros. Coal Mining

Co. vs. Penn. R. R. Co., 238 Fed. 642, and Lehigh Valley R. Co. vs. American Hay Co., 219 Fed. 539.

Substantially all cases involving Section 4, which proceed the cases at bar, were brought before the Commission. It would be a task of no small magnitude to assemble all of the cases of the Commission holding that in such cases evidence of the difference in rates is no proof of damage. We have already referred to a few of them and will refrain from citing more because plaintiff will concede that to be the long established ruling of the Commission.

CONCLUSION

Summarizing our contentions, they are:

First. The District Court was without jurisdiction because the action belongs to the class of which the Interstate Commerce Commission has exclusive original jurisdiction.

Second. The Fourth Section of the Interstate Commerce Act is a statute relating to a form of discrimination and not one merely declaring an intermediate rate unlawful.

Third. Section 6 of the Interstate Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. This section is supreme over those forbidding unreasonable, preferential and discriminatory rates.

Fourth. The Fourth Section of the Interstate Commerce Act specifically provides that it shall not be construed as authority for charging the same rate to an intermediate point as to a more distant point. Therefore, if the rate from Roswell published in the tariffs was not the legally published rate, there was no legally published rate. No court has power to fix the rate from the more distant point or any other rate as the lawful rate to be collected from the intermediate point.

Fifth. If there was no legally published rate the transportation was unlawful and the courts will not aid the shipper to recover all or part of the charges paid.

Sixth. Discrimination may be removed by lowering one rate, raising the other, or changing both, and the only authority to direct the method by which the discrimination shall be removed in the absence of voluntary action by the carrier, is lodged in the Interstate Commerce Commission.

Seventh. Section 10 of the Federal Control Act lodged exclusive original jurisdiction of cases against the Director General arising out of alleged violations of the Interstate Commerce Act in the Interstate Commerce Commission.

Eighth. Section 206 (c) of the Transportation Act requires all actions against the Director General for alleged violations of the Interstate Commerce Act, brought after Federal Control, to be brought before the Interstate Commerce Commission.

Ninth. There was no violation of the Fourth Section of the Act, because the Director General did not in fact charge or receive more for transportation from Roswell than from Pecos. The evidence does not disclose that the Director General ever charged or received any sum whatever for transportation from Pecos.

Tenth. There was no violation of the Fourth Section because the Federal Control Act subjected the Director General to the provisions of the Interstate Commerce Act only insofar as that Act was not inconsistent with any order of the President. The rates in question were fixed by order of the President.

Eleventh. No damages were proved, the difference in the rates not being the measure of damages.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

MOTION FOR WRIT OF CERTIORARI

The petitioner herein, James C. Davis, Agent, by his counsel, moves this Honorable Court that it shall by certiorari, or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the petitioner, James C. Davis, Agent, was plaintiff in error,

and the respondent, The Portland Seed Company, a corporation, was defendant in error, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

The respondent, THE PORTLAND SEED COMPANY, is hereby notified that the petitioner, James C. Davis, Agent, on Monday, the ..... day of ....., 1922, upon its verified Petition and a copy of the entire record in this cause at the opening of the Court on that day, or as soon thereafter as counsel can be heard, will submit a motion, (a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you) to the Supreme Court of the United

States in its Courtroom at the Capitol in the City of Washington, D. C.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the Petition for Writ of Certiorari and Brief in support of the Petition, are hereby acknowledged this 2 day of January, 1922.

.....

Attorney for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Supreme Court of the United States:

The petition of JAMES C. DAVIS, Agent, United States Railroad Administration, respectfully shows:

I.

By an action at law lately pending in the District Court of the United States for the District of Oregon, the respondent recovered a judgment against petitioner for the sum of Five Hundred Forty-Eight and 96/100 ($548.96) Dollars, with interest at the rate of six per cent (6 per cent) per annum on the sum of Three Hundred Seventy-one and 09/100

($371.09) Dollars from January 8, 1919, and with interest on the sum of One Hundred Seventy-seven and 87/100 ($177.87) Dollars at the rate if six per cent per annum from the 24th day of January, 1919, and the further sum of One Hundred Seventy-five ($175.00) Dollars as attorney's fees, together with costs and disbursements upon a cause of action set forth in its complaint, the substance and gravamen of which is the following:

(a) The respondent, a corporation of the State of Oregon, on or about the month of December, 1918, purchased from E. W. Mitchell at Roswell, New Mexico, two carloads of alfalfa seed. The said Mitchell on December 19th, 1918, delivered to your petitioner at Roswell, New Mexico, one carload thereof, which your petitioner accepted, agreed to and did transport over the lines of the Atchison, Topeka & Santa Fe Railroad Company from Roswell, New Mexico, to Denver, Colorado; thence via the lines of the Union Pacific Railroad Company to Granger, Wyoming; thence via the lines of the Oregon Short Line Railroad Company to Huntington, Oregon, and thence via the lines of Oregon-Washington Railroad & Navigation Company to Yakima, Washington, and there delivered same to the respondent.

which shipment will be hereinafter called the "Yakima shipment". The said Mitchell also on or about January 4, 1919, did deliver to your petitioner an additional carload of alfalfa seed, which petitioner accepted, agreed to and did transport over the lines of the aforesaid railroad companies to Walla Walla, Washington, and there delivered same to the respondent, which shipment will be hereinafter called the "Walla Walla Shipment". The lines of railroad of the aforesaid companies were in possession and under the control of the Government of the United States, under the acts of Congress relating to the Federal Control of Railroads and were operated by a predecessor of your petitioner called herein "United States Railroad Administration."

(b) The Railroad Administration assessed and collected freight charges, including war tax, against the Yakima shipment the sum of One Thousand Three Hundred Eleven and 75/100 ($1311.75) Dollars, and in respect to the Walla Walla shipment, including war tax, the sum of Seven Hundred Fifteen and 79/100 ($715.79) Dollars, which the respondent paid. There was no through rate in effect at the time of the movement from Roswell, New Mexico, to Walla Walla and Yakima, Washington, respectively, and the freight charges as finally

collected were made up of the combination of local rates through Denver, Colorado, which aggregated the sum of Two and 44|100 ($2.44) Dollars per cwt.

(c) At the time said shipments moved there was established and in effect over the lines of railway above stated from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, a rate of One and 51½|100 ($1.51½) Dollars per cwt. Pecos, Texas, is a point on the line of railroad of the Atchison, Topeka & Santa Fe Railroad Company, more distant from Walla Walla and Yakima, Washington, over the route by which said shipments moved than Roswell, New Mexico. The United States Railroad Administration did not apply to the Interstate Commerce Commission and secure authority to charge less for the transportation of property from Pecos, Texas, to points in the State of Washington, including Walla Walla and Yakima, than for the transportation of said property to said points from Roswell, New Mexico, over the same line or route.

(d) The premises considered, respondent concludes your petitioner violated Section 4 of the Act to Regulate Commerce in assessing and collecting the aforesaid sums of money as

freight charges on said shipments, although there was no proof that your petioner assessed or collected any charges whatsoever for a transportation movement of property from Pecos, Texas, to Yakima and Walla Walla, respectively, over the same line or route the two carloads of alfalfa seed actually moved to those points from Roswell, New Mexico. In fact, there was no such movement from Pecos, Texas. As a further conclusion, respondent claims that by virtue of the facts constituting the transaction the only lawful rate properly assessable against the shipment from Roswell, New Mexico, to the respective points of destination was the rate to such points from Pecos, Texas, namely: One and 51½|100 ($1.51½) Dollars per cwt., on which basis the lawful rate, including war tax, on the Yakima shipment did not exceed Nine Hundred Forty and 66|100 ($940.66) Dollars, nor upon the Walla Walla shipment the sum of Five Hundred Thirty-seven and 92|100 ($537.92) Dollars, and judgment against your petitioner was prayed for in sums on the Yakima shipment of the difference between One Thousand Three Hundred Eleven and 75|100 ($1311.75) Dollars, the amount collected, and the sum of Nine Hundred Forty and 66|100 ($940.66) Dollars, the amount which should have been collected, equaling Three Hundred

Seventy-one and 09|100 ($371.09) Dollars, and the Walla Walla shipment, the difference between Seven Hundred Fourteen and 79|100 ($714.79) Dollars, the amount collected, and the sum of Five Hundred Thirty-seven and 92|100 ($537.92) Dollars which should have been collected, equaling the sum of One Hundred Seventy-seven and 87|100 ($177.87) Dollars, which two sums aggregate Five Hundred Forty-eight and 96|100 ($548.96) Dollars, in which sum the respondent claims to have been damaged because of the violation of Section 4 of the Interstate Commerce Act known as the Long and Short Haul clause, and entitled to recover same from your petitioner in virtue of Section 8 of the Act to Regulate Commerce, together with attorney's fees, to be taxed as part of the costs of the case.

II.

The cause of action was tried in the District Court of the United States for the District of Oregon. There was no dispute that the shipments were made, the tariffs naming local rates from Roswell, New Mexico, to points of destination, which aggregated Two and 44|100 ($2.44) Dollars, and the tariff naming a through rate from Pecos, Texas, to such points of destination were duly published and filed with the Interstate Commerce Commission as

required by Section 6 of the Interstate Commerce Act. It was also an undisputed fact that petitioner did not, prior to the movement in question, secure authority from the Interstate Commerce Commission to charge less for a transportation movement from Pecos, Texas, to Yakima and Walla Walla, Washington, respectively, than from Roswell, New Mexico, over the same line or route, and it was also a fact, undisputed, that Pecos, Texas, is a point more distant from Walla Walla and Yakima, Washington, respectively, over the aforesaid lines and route than Roswell, New Mexico.

III.

At said trial your petitioner made the following contentions:

(a) The District Court had no jurisdiction of the above cause of action, because the same was controlled by Section 206 (c) of the Transportation Act, 1920, in that said cause of action essentially was one praying for reparation on account of damage claimed to have been caused by reason of the collection of rates and charges in violation of the Interstate Commerce Act.

(b) Because there was no proof other than the difference between the amounts collected

based on the local rate from Roswell, New Mexico, to points of destination of Two and 44/100 ($2.44) Dollars per cwt., and the amount which would have been collected if the through rate from Pecos, Texas, had been applied of One and 51½/100 ($1.51½) Dollars per cwt., of the amount of damages sustained as required by Section 8 of the Interstate Commerce Act.

(c) In short, the difference between the rate from Roswell, New Mexico, to the points of destination and the rate from Pecos, Texas, the more distant point, applied to the shipment, is not the proper measure of damages for a violation of Section 4 of the Act to Regulate Commerce recoverable in virtue of the provisions of Section 8 of such Act.

(d) The sole jurisdiction of causes of action, the gravamen of which is alleged violation of Section 4 of the Interstate Commerce Act, is with the Interstate Commerce Commission, since if the higher rate to the less distant point is unlawful, although duly published and filed with the Interstate Commerce Commission, then there is no lawful rate under which the shipments herein may move until a lawful tariff naming such rates shall have been published and filed with the Interstate Commerce Commission. It was the duty of the respondent to

submit the entire question to the Interstate Commerce Commission, secure the establishment of a lawful rate and request reparation for the amount of damages which he may have been able to prove, and for this reason the courts have no jurisdiction until after the Interstate Commerce Commission shall have made a reparation award.

IV.

The District Court overruled the contentions of your petitioner and on June 1, 1921, entered a judgment in favor of the respondent and against your petitioner for the amount prayed for and taxed as costs a further sum of One Hundred Seventy-five ($175.00) Dollars as attorney's fees.

V.

Your petitioner thereupon caused the record in said case to be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit on writ of error. Said action was consolidated for trial in the Circuit Court of Appeals with the cases of James C. Davis, Agent, plaintiff in error, vs. A. J. Parrington, defendant in error, and The San Francisco & Portland Steamship Company, plaintiff in error, vs. A. J. Parrington, defendant in error, which two cases involve among other questions, the same questions dis-

closed by the record in this case. Upon completion of the joint trial of said three causes in the United States Circuit Court of Appeals, for the Ninth Circuit, the same were taken under advisement by said court, and on June 5, 1922, a joint opinion was filed and several judgments entered, among which was a judgment affirming the judgment of the District Court of the United States for the District of Oregon in the above entitled action, with a further sum of One Hundred ($100.00) Dollars as attorney's fees ordered taxed as a part of the costs in that court pursuant to Section 8 of the Interstate Commerce Act. Respondent made the same contentions in the Circuit Court of Appeals in each of said cases as were made in the District Court, and said Court in affirming the judgment of the District Court erroneously overruled and denied the same.

VI.

The jurisdiction of the Court in each of these three cases was based upon Section 24, Paragraph 8, of the Judicial Code, which provides district courts shall have original jurisdiction, "Eighth. Of all suits and proceedings arising under any law regulating commerce."

In the cases of James C. Davis, Agent, plaintiff in error, vs. A. J. Parrington, defen-

dant in error, and The San Francisco and Portland Steamship Company, plaintiff in error, vs. A. J. Parrington, defendant in error, which were jointly tried in the Circuit Court of Appeals with this case, the amount involved exceeded the sum of One Thousand Dollars besides costs, and the cases did not fall within the provisions of Section 128 of the Judicial Code, whereby the judgments of said Circuit Court of Appeals were final; whereupon your petitioner herein, as plaintiff in error in said two cases, prosecuted a writ of error to the Supreme Court of the United States under the authority of Section 241 of the Judicial Code.

VII.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court because the amount involved herein does not exceed the sum of One Thousand Dollars, besides costs. The Circuit Court of Appeals stayed its mandate until the 31st day of August, 1922, to give time for the presentation and determination of this petition. Your petitioner presents herewith, as a part of this petition, a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

VIII.

The petitioner is entitled to have its prayer for a Writ of Certiorari granted for the following reasons:

(a) The decisions of the Circuit Court of Appeals for the Ninth Circuit in this and the two companion cases jointly argued, submitted and decided with it respecting the character of proof and measure of damage for a violation of the Long-and-Short Haul Rule of the fourth section of the Act to Regulate Commerce, are in conflict with a long line of decisions on the same subject by the Interstate Commerce Commission. For example, the Circuit Court of Appeals for the Ninth Circuit in the case of Southern Pacific Company vs. California Adjustment Company, 237 Federal Reporter, 954, was an action for damages against the carrier for a violation of Section 21 of the California Constitution, as amended October 10, 1911, which provision of said constitution is *in haec verba* of Section 4 of the Act to Regulate Commerce, and the Court at page 965 of the Report held the Adjustment Company by the very nature of the transaction damaged in an amount equal to the difference between the rate from the more distant point to destination than from the intermediate point to the same destination, and allowed a recovery in virtue of Section 73 (a)

of the Public Utilities Act of the State of California, which is in substance the same as Section 8 of the Interstate Commerce Act. The facts in the Seed Company case are set out in the opinion of the Circuit Court of Appeals on page 102 of the Transcript, and following the decision in the case of California Adjustment Company vs. Southern Pacific Company, 237 Federal, 954, the Circuit Court of Appeals in its opinion at page 111 of the Transcript in this case said:

> "Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland is improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Co., 237 Fed. Rep., 954, where it was held that the rule adopted by the District Court is the correct one. In its essential respect, the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the Long-and-Short-Haul clause."

No cases construing the Long-andShort-Haul clause of the Interstate Commerce Act with respect to the measure of damages for its violation (to the extent of our research) have been

made by any other Federal Court. The views of the Interstate Commerce Commission upon the same question supports the rule as follows:

> "In the absence of proof of the damage to the shipper, the fact that carriers have charged or received rates which violate the Long-and-Short-Haul rule of the 4th Section of the Act is not of itself a sufficient basis for an award of reparation."
>
> Oregon Fruit Co. vs. Southern Pacific Co., 50 I. C. C. 719.
>
> Nix & Co. vs. Southern Railway Co., 31 I. C. C., 145, 149.
>
> Chattanooga Implement & Mfg. Co. vs. L. & N. R. R. Co., 40 I. C. C., 146.
>
> LaCrosse Shippers' Assn. vs. C. I. & L. Ry. Co., 43 I. C. C., 520, 524.
>
> United States Glue Co. vs. C. & N. W. Ry. Co., docket No. 6832, unreported.

Petitioner alleges, therefore, that the opinions and decisions of the Circuit Court of Appeals in this and its companion cases are strictly in conflict with the opinions and practices of the Interstate Commerce Commission for many years, and it is undoubtedly in the public interest that this Honorable Court declare the true rule in the premises.

(b) The District Court, as well as the Circuit Court of Appeals in the cases, have regarded them as being substantially actions to recover money which the carrier has illegally exacted, and since the same could have been maintained against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to the shipments moving during the period of Federal control as declared in Section 206(a) of the Transportation Act, 1920.

> See opinion District Judge Bean, Trans. 34. Also opinion Circuit Judge Hunt, Trans. 107.

But it is submitted there is error in holding this and its companion cases to be

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916)"

of the character which could have been brought against the carrier, etc., as contemplated by Section 206(a) of the Transportation Act as distinguished from cases wherein complaints are brought praying "for reparation on account of

damage claimed to have been caused by reason of the collection during the period of Federal control of rates * * * in violation of the Interstate Commerce Act," as defined by Section 206(c) of the Transportation Act. In short, the cases are not of the type referred to in Section 206(a) of the Transportation Act, but are clearly cases falling within Section 206(c) of the Transportation Act, 1920, in that they seek damages by reason of the collection of rates in violation of the Interstate Commerce Act. If they are classified as instanced in the latter section, the jurisdiction to hear same is lodged with the Interstate Commerce Commission, because the section provides those complaints "may be filed with the Commission" within a certain period of time after Federal control ceased. It is important to the United States Railroad Administration and petitioner as the Agent of the President, and, therefore, important to the Government and people of the United States, that the question arising out of the conflict of the jurisdiction of the courts and Commission in view of Sections 206a) and 206(c) be set at rest by the opinion of this Honorable Court.

Numerous actions involving large amounts of money have been begun against your petitioner in various forums throughout the United

States and the course of the decisions on the question therein depend upon the views of this Court as declared in the Parrington cases reaching this court on writs of error and in this case if the Court shall have issued the writ prayed for. Moreover, if in the decision upon the writs of error prosecuted in the Parrington cases decided jointly in the Circuit Court of Appeals with this case, the judgments of the Circuit Court of Appeals are reversed, the principles announced therein will not control the decision in this case unless this Court shall require by certiorari or otherwise the case certified to the Supreme Court for its review and determination according to the power and authority declared in Section 240 of the Judicial Code.

WHEREFORE, in view of the premises, petitioner prays that this Honorable Court will grant its Writ of Certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit requiring the record of said cause in said Court and its judgment be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse the said judgment and remand the cause and give to your petitioner such other and further relief as the nature of the

case may require and to the Court may seem proper in the premises.

ARTHUR C. SPENCER,
JOHN F. FINERTY,
CHARLES E. COCHRAN,
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. ss.

CHARLES E. COCHRAN, being first duly sworn, states:

That he is one of the Attorneys for the petitioner and has read the foregoing petition subscribed by him; knows the contents thereof, and the facts therein stated are true, except those stated upon information and belief, and as to such he believes the same to be true.

.....

Subscribed and sworn to before me this..... day of August, 1922.

.....

Notary Public for Oregon.

My commission expires .....

I HEREBY CERTIFY that I have examined the foregoing Petition, and that in my opinion it is well founded as to matters of fact and law, and that this case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

.....

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

During December, 1918, and January, 1919, E. W. Mitchell of Roswell, New Mexico, delivered to the Director General of Railroads, two carloads of alfalfa seed consigned to shippers' order, notify Portland Seed Company, one car destined to Yakima and the other to Walla Walla, Washington, which moved over the lines of the Atchison, Topeka & Santa Fe Railroad Company to Denver, Colorado; thence via the line of the Union Pacific Railroad Company to Granger, Wyoming; thence via the Oregon Short Line Railroad Company to Huntington, Oregon, and thence via the Oregon-Washington Railroad & Navigation Company to points of destination. Upon arrival of said two cars at the respective points of destination the notify party was duly notified and who surrendered the bills of lading properly endorsed (see Plaintiff's Exhibits 1 and 2, Trans. 69). The Director General collected for the Yakima shipment the sum of one thousand three hundred eleven and 75/100 ($1,311.75) dollars, and for the Walla Walla shipment the sum of seven hundred fifteen and 79/100 ($715.79) dollars. The duly filed and published rate on

alfalfa seed in carload moved from Roswell, New Mexico, to Yakima and Walla Walla, Washington, two and 44/100 ($2.44) dollars, per cwt., which was the amount petitioner actually charged (Trans., p. 56). This rate is a combination of local rates from Roswell to Denver, and from Denver to Walla Walla and Yakima, and was the rate actually charged. The through rate from Pecos, Texas, to Walla Walla and Yakima, Washington, was one and 51½/100 ($1.51½) dollars per cwt. (Trans., 53.) The excess of the Roswell rate over the Pecos rate when applied to the quantity of alfalfa shipped amounts to the sum of five hundred forty-eight and 96/100 ($548.96) dollars, which was the amount prayed for, plus attorney's fees, interest and costs. Because Pecos, Texas, was a point more distant than Roswell, New Mexico, on the same line or route over which the shipments moved, it was claimed any sum collected in excess of the Pecos rate was in violation of Section 4 of the Long-and-short-haul clause of the Interstate Commerce Act.

The case was tried before the court. The intervention of a jury waived by written stipulation. Judgment against petitioner in the amount prayed for was obtained, together with the sum of one hundred seventy-five ($175.00) dollars as attorney's fees (Trans., 43). The

complaint setting forth the cause of action as above appears at page 6 of the Transcript. To this complaint a demurrer was filed, alleging the court had no jurisdiction of the subject matter of the action (Trans., 24). This demurrer was overruled (Trans., 26), and an answer filed (Trans., 18). Upon the trial the facts alleged in the complaint were established and an issue upon law was made, your petitioner contending as set forth in its petition for the Writ of Certiorari.

POINTS

I.

An inspection of the complaint and a consideration of the undisputed facts disclose this case to be within Section 206 (c) of the Transportation Act, which reads, in part, as follows:

> "(c). Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection . . . during the period of Federal control, of rates . . . in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal control against the agent designated by the President, under subdivision 'a' naming in the petition," etc., certain facts.

Under this statute it was the duty of the respondent to file his complaint with the Interstate Commerce Commission. If that was done the subject matter of the complaint and the questions tendered thereby would have been decided according to the rules, practices and opinions of the Interstate Commerce Commission. The Commission has long been of opinion, in the absence of proof of damage to the shipper, the fact that carriers have charged or received rates which violate the Long-and-short-haul rule of the fourth section of the Act is not of itself sufficient basis for an award of reparation.

Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C., 719.

Nix & Co. v. Southern Railway Co., 31 I. C. C., 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C., 146.

LaCrosse Shippers' Ass'n. v. C., I. & L. Ry. Co., 43 I. C. C. 520, 524.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

In point of fact there were no shipments of alfalfa sent from Pecos, Texas, to Walla Walla or Yakima, Washington, or to Northwest points, nor as far as any other point is con-

cerned so far as petitioner is informed during the period of Federal control. The record fails to show any such shipments. If respondent's rights and remedies are governed by the rules laid down by the Interstate Commerce Commission, he will have been compelled to offer proof of damage differing and apart from the mere fact of charging the Roswell rate when there was also effective the Pecos rate in a lesser amount. The respondent cannot show damage of the type required by the rules of the Interstate Commerce Commission. If such rules control the measure of the Government's obligation, then it has no obligation to respondent, or any other shipper, for a sum equivalent to the excess between the two rates applied to the two shipments, and to allow these cases to remain in judgment based upon a record disclosing absence of the required proof according to the rules laid down by and opinions of the Interstate Commerce Commission, is to require your petitioner, as a successor of the U. S. Railroad Administration, to pay Government funds in accordance with erroneous principles of law.

II.

The jurisdiction of the courts in cases of this type is to be determined from an inspection of Sections 206a and 206c of the Transportation Act of 1920.

We may safely assume, that but for those two sections, no actions, suits or proceedings of any kind can be now brought against the Government of the United States respecting causes of action arising during and under Federal control of railroads. Those sections constitute the Government's consent to be sued, and obviously the consent is given only to actions of the character mentioned in those two sections, and also only in the forums prescribed by those sections. Section 206a refers only to actions at law, suits in equity or proceedings in admiralty based on causes of action arising out of the *possession, use and operation* by the President of these railroads, if such actions, suits or proceedings could have been brought against the railroad company whose lines were under Federal control. Damages caused by the collection of rates, the enforcement of regulations or establishment of classifications and practices which were in violation of (a) Sections 1, 2 or 3 of the Interstate Commerce Act by being unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial, or (b) otherwise in violation of the Interstate Commerce Act may be recovered by filing the complaint with the Interstate Commerce Commission within a certain time as provided in Section 206c of the Transportation Act.

If a cause of action, but for Federal control, is to be propounded in the courts because of acts "in violation of the Interstate Commerce Act," that is, an action authorized by Section 8 thereof, and many of them have been, then it must follow the procedure in such cases has been modified by Section 206c requiring such cause of action to be filed with the Interstate Commerce Commission. There is error in the opinion of the Circuit Court of Appeals in holding to the contrary (see opinion, Judge Hunt, Trans., 107), for if Section 206a expresses the general consent of the Government to be sued in the courts, then Section 206c must be held a modification of the general consent, to the extent of providing the forum where suits based upon the "violation of the Interstate Commerce Act" may be brought. It is a canon of statutory construction that general provisions must give way to specific provisions, or to restate the question concretely, that the special directions of Section 206c that cases for a violation of the Interstate Commerce Act must be filed with the Interstate Commerce Commission controls such cases, notwithstanding the more general provisions of Section 206a.

Principles contended for find support in the cases of

Rogers v. U. S., 183 U. S. 83, 87.

In re Anderson, 214 Fed. 662.

Congress certainly never intended claims for charges over the legal tariff charge, and that is all a violation of the fourth section can be, should be sued on in the courts. The records of the Interstate Commerce Commission show that more than forty-five thousand such claims have been filed with the Interstate Commerce Commission. If Congressional intention on the subject was doubtful, it has been set at rest by the amendment to the Transportation Act, 1920, approved February 24, 1922, which is an act entitled "An act to amend Subdivisions (a) and (c) of Section 206 of the Transportation Act, 1920."

This amendment added the words,

> "Or if so claimed in respect of overcharges above the legal tariff charge."

Then such acts in violation of the Interstate Commerce Act should be filed with the Commission "within two years and six months after the termination of Federal control" instead of one year as was previously provided.

Section 206c further provides,

> "The Commission is hereby given jurisdiction to hear and decide such complaints

in the manner provided in the Interstate Commerce Act," etc.

Therefore, whether the action could have been brought against the carrier but for Federal control, and even though it may arise "out of the possession, use or operation by the President of the railroad or systems of transportation of the carrier," and be of such character as prior to Federal control could have been brought against the carrier company as provided by Section 206a, it must now be brought against your petitioner as agent of the President in the manner prescribed by Section 206c.

The claim has been made as intimated in the case of *Southern Pacific Company v. California Adjustment Co.*, 237 Fed. 954, that this was merely an action to recover money illegally exacted, but this contention is unsound, for otherwise attorney's fees could not have been taxed as part of the costs. The authority whereby to recover attorney's fees as part of the costs, is found in Section 8 of the Interstate Commerce Act, and that section solely creates liability for damages "sustained in consequence of any such violation of the provisions of this act," meaning the Act to Regulate Commerce. It follows that if the District Court and Circuit Court of Appeals are correct in holding

this to be an action to recover money illegally exacted under authority of *California Adjustment Co. v. Southern Pacific Company*, 237 Fed. 954, then it was not an action authorized by Section 8 of the Interstate Commerce Act, and attorney's fees cannot be taxed as part of the costs. The judgments are, therefore, erroneous under that theory to the extent of the attorney's fees so taxed.

III.

It was the duty of your petitioner's predecessor, the Director General of Railroads, to collect the duly published and filed tariff rate.

Bearing in mind that both the Roswell and Pecos rate to the respective destinations of these two shipments are contained respectively in duly published and filed rates, the former found in the local tariff of the Atchison, Topeka & Santa Fe Railroad Company, reading from Roswell, New Mexico, to Denver, Colorado, and the local rate from Denver, Colorado, to Yakima and Walla Walla, Washington, in the tariffs of the Union Pacific System, which includes the Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, and the latter rate found in the joint tariff published and filed by United States Railroad Administration, the question arises,

what was the legal duties of the carrier in respect to this traffic?

Paragraph 7 of Section 6 of the Interstate Commerce Act reads in part as follows:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation . . . between the points named in such tariffs than the rates, fares and charges which are specified in the tariffs filed and in effect at the time."

Departure from this statute has been uniformly condemned.

> *Louisville, etc., Ry. v. Maxwell*, 237 U. S. 94.

The violation of Section 4 of the Interstate Commerce Act arises from facts proven. It cannot be determined by an inspection of tariffs. It was the duty of the Director General of Railroads to collect the amount fixed in the tariffs. In the case before us that legal duty was performed. If such rate because of certain geographical conditions shown by evidence is violative of Section 4 of the Commerce Act when applied to traffic, and a shipper pays same, then the Director General or the carrier, as the case may be, is in the position of being

compelled by Section 6 of the Interstate Commerce Act to collect the rate, and by Section 4 prohibited therefrom. Statutes thus construed become impossible of being complied with, but are workable and may be complied with by relegating the shipper to the Interstate Commerce Commission where he may strike down the rate collected in virtue of Section 6, secure the Commission's judgment as to what is a reasonable rate on the shipment moved from the intermediate point, and if he can prove damages have been suffered, secure an award of reparation.

The Commission has long been of opinion that departures from the long-and-short-haul rule of the fourth section does not of itself prove that the rate from the intermediate point was unreasonable.

> *Stanton & Co. v. N. P. Ry. Co.*, 45 I. C. C. 583.

If that rule is correct, neither court nor commission may disapprove the Roswell rate without testimony that it was unreasonable. As thus viewed, the question becomes administrative. An administrative question applies to any practice of a carrier which gives rise to the application of a rate.

> *Northern Pacific Ry. Co. v. Solun*, 247 U. S. 477.

Texas & Pacific v. American Tie & Timber Co., 234 U. S. 138, 147.

Pennsylvania Ry. Co. v. Periton Coal Co., 237 U. S. 121, 131.

Pennsylvania Ry. Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456, 469.

The Pecos rate may have been unreasonably low. The interdiction of Section 4 of the Commerce Act could have been avoided by raising the Pecos rate to a sum equal or greater than the Roswell rate. The record is silent on the reasonableness of each rate. It was the legal obligation of respondent to pay a reasonable rate on the shipments from Roswell, New Mexico, to the Washington destinations. There is no authority in this record for the court to decide the Pecos rate reasonable for a movement from Roswell, New Mexico. The entire subject is one peculiarly within the jurisdiction of the Interstate Commerce Act, and it is fundamental learning that actions in courts containing similar questions are prematurely brought prior to an award by the Interstate Commerce Commission.

IV.

It has been pointed out in our petition for the Writ of Certiorari that the decision of the

Circuit Court of Appeals for the Ninth Circuit is in conflict with a long line of decisions on the same subject by the Interstate Commerce Commission.

For a number of years the Interstate Commerce Commission has held the fact that carriers have charged or received rates which violate the long-and-short-haul rule of the fourth section of the act is not of itself a sufficient basis for an award of reparation. There must be proof of damages. The following decisions of the Interstate Commerce Commission support the principle:

Nix & Co. v. Southern Railway Co., 31 I. C. C. 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146.

LaCrosse Shippers' Ass'n. v. C. I. & L. Ry. Co., 43 I. C. C. 520, 524.

Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719, 722.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

Iten Biscuit Co. v. C. B. & Q. Ry. Co., 50 I. C. C. 724, 727.

Iten Biscuit Co. v. C. B. & Q. Ry. Co., 53 I. C. C. 729.

Birmingham Packing Co. v. Dir. Gen., 59 I. C. C. 81, 89.

Indian Refining Co. v. Dir. Gen., 59 I. C. C. 246, 247.

DuPont De Nemours & Co. v. Dir. Gen., 59 I. C. C. 199, 201.

The Commission was guided in announcing the above rule by the decision of this court in the case of

Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184, 203.

Jurisdiction on certiorari has been taken under many circumstances:

(a) Because of the general effect or pressing importance of the question involved.

St. L. Ry. Co. v. Wabash Ry. Co., 217 U. S. 247.

(b) Where decisions of the Circuit Courts of Appeal are in conflict.

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403.

(Note.—There would appear to be no good reason why the principle should not be extended and allow certiorari where there is a conflict

between the decisions of the Interstate Commerce Commission and the lower Federal courts in commerce cases.)

(c) Where questions of Federal jurisdiction are involved.

Atlanta Transport Co. v. Imbrovek, 234 U. S. 52.

Wells & Co. v. Castonia Cotton Mfg. Co., 198 U. S. 177.

It follows, therefore, and for these reasons, the Circuit Court of Appeals for the Ninth Circuit, as well as the District Court of the District of Oregon, are in error in respect to this case, and the same cannot be corrected unless this court by a writ of certiorari or otherwise shall require the record and judgment in this case to be certified for review that such error may be corrected, and that done in the premises what of right should be done according to the law and the practice of this court.

Respectfully submitted,

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No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1922

JAMES C. DAVIS, Agent, United States Railroad Administration,

Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals of the Ninth Circuit

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

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BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

The Railroad Administration's assistant general counsel on behalf of plaintiff in error has filed a supplemental brief herein of 82 pages, discussing in great detail generally his ideas of the construction of the long and short haul clause of the 4th Section of the Act, and maintaining that no violation of the Act has been shown because there was no proof of shipments between the more distant points to which the lesser rate applied, and also maintaining that the Director General was not sub-

ject to the 4th Section of the Act to Regulate Commerce.

We will not attempt to discuss every particular angle of the attorney's discussion, as we will attempt to point out that the subjects which he discusses are in fact determined by the interpretation which this Court has already placed upon the 4th Section. It will be noted that the greater portion of counsel's supplemental brief is devoted to an attempt to secure an interpretation of the 4th Section to the effect that the mere publication of a lesser rate to the more distant point does not constitute a violation of the Interstate Commerce law, and that the higher rate to the intermediate point when published in the tariffs remains the only lawfully published rate to the intermediate point and must be charged notwithstanding the law says that no such charge shall be made and that no violation of the long and short clause of the 4th Section can exist until it is actually proven that shipments have been made to the more distant point at the lesser rate. It should also be noted that counsel's argument concedes that for any carrier other than the Director General when a shipment has in fact been shown to have been made to the more distant point it has violated the long and short haul clause and renders itself immediately liable to damages and to the criminal penalty, and that the measure of the damages is the difference in the rate charged to the intermediate point and the lesser rate charged to the more distant point, the latter concession being

diameterically opposed to the contention of counsel in the Director General's opening brief.

This interpretation of the long and short haul clause is diametrically opposed to the interpretation of the 4th Section by this Court in United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, pointed out and referred to in our former brief. To our mind, the decision in that case answers every phase of the discussion of the 4th Section contained in the supplemental brief, and the contention of the assistant general counsel of the Railroad Administration can only be sustained on the basis of the incorrectness of that decision. The 4th Section made it absolutely unlawful to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for the longer distance over the same line or route in the same direction, the shorter being included within the longer distance. The first proviso provided that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less than for the shorter distances. The second provisio reads: "Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act *shall be required to be changed* by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this

Section until a determination of such application by the Commission." In the Louisville & Nashville case this Court interprets the prohibition of the section in connection with the provision as to no rates being required to be changed within six months, as absolutely prohibiting the existence of such rates after the expiration of that time, if at that time no application had been filed with the Commission to continue the same.

The language of this Court, speaking through the late Chief Justice White (235 U. S. Page 323), is: * * * "And for the purpose of making the prohibition efficacious, it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted" * * * The proviso that no changes were required to be made in the *rates or charges* lawfully existing until a certain time and on a certain contingency, taken in connection with the absolute prohibition of the section against that character of charges can certainly only be interpreted as absolutely prohibiting the existence of any such rates after the expiration of the time where no application had been made to continue them, and to require a change in any theretofore lawfully existing rate or charge of that character. Under the interpretation contended for by counsel in the supplemental brief there would have been no requirement on the part of the carrier to have changed a single rate, and such rates could have gone on forever, or until such time as someone had shipped to the

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

Under counsel's contention, if a carrier should apply to the Commission for permission to charge less to the more distant point than to the intermediate point, and the Commission should deny the application, the carrier could go on charging the higher rate to the intermediate point without any penalty or without violating the section until there had been a shipment to the more distant point.

To our mind this contention is absurd. To illustrate, after the denial of the application by the Commission, the carrier could continue its rates on a higher basis to the intermediate point and if a shipment to the intermediate higher rate point is made, say on January 1st, there would be no violation of the Act and consequently no recovery. On January 3rd a shipment occurs to the more distant point at the lesser rate. There is still no violation of the Act as to the shipment on

January 1st, because at the time it was made there had been no shipment to the further point. On January 5th, however, another shipment is made to the intermediate point at the higher rate, but this is illegal because on January 3rd there had been a shipment to the further point at a less rate, and this notwithstanding there had been an order prior to any of the shipments denying to the carrier the right to charge more to the intermediate point.

It seems to us that no such possible interpretation of the Act can be made.

The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and charges into effect by filing and publication for a period of thirty days before such charges become effective. The public is bound to take notice of such filing and publication and any rates or charges established cannot be changed except by special permission without thirty days publication of such change. The higher charge to an intermediate point cannot be made without previous authority of the Commission after investigation, and the authorization of such higher charge must necessarily have preceded the filing of the tariffs.

The only reasonable interpretation therefore which can be placed upon the amendment of the 4th Section is that which has in fact been placed thereon by this Court, to-wit, that after the date named where no application was filed, the higher rate to the intermediate point ceased to exist. The assistant general counsel for the Railroad Administration realized that this Court's interpretation of this section was absolutely fatal to his contention. He cannot distiguish the case and he therefore flatly contradicts it and italicizes the contradiction thus: "With all due deference to the late Chief Justice, it *was not* 'enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted'. *It was merely enacted* that such rates *should be unlawful* for the future unless authorized by the Commission upon application" * * * (Page 22 of Assistant General Counsel's Supplemental Brief). He further tries to depreciate the effect of that decision by saying (page 23): "Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case" * * * This Court, speaking through the late Chief Justice was very particular to answer that very question on Page 323 of 235 U. S., in language beginning thus: * * * "To determine whether Section 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the

existence of which it depended" * * * and very specifically points out the nature and effect of the rebilling privileges and wherein the rates there in question were a violation of the long and short haul cause. The Court was very particular also to refer to the fact (Page 325) that in the argument the matter had been put up as a question of preference or discrimination under Sections 2 and 3 of the Act, and not an inquiry under Section 4, but the Court said that notwithstanding this fact and disregarding immaterial considerations of form and looking to the substance of things, that it was a violation under Section 4, and again on Page 326 the Court says: "And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined *by the substance of things, and not by names*, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose." Counsel further attempts to depreciate the effect of this decision by saying (Page 23 of Counsel's Supplemental Brief), that when the case went back to the Commission it was disposed of by the Commission considering it as a case under Section 3 and not under Section 4, and cites Duncan vs. N. C. & St. L. Ry. Co., 35, I. C. C. 477.

We have examined this opinion of the Commission and are at a loss to understand counsel's statement, for the opinion distinctly states that the case was back before the Commission not only as a preference under

Section 3, but upon applications of the carriers under Section 4, and the Commission states in its opinion that no facts had been adduced by the carriers under their application under Section 4, which would warrant the Commission in granting relief under that Section. The Commission also refers to the fact that additional applications had been made by the carriers involved in the Nashville Case with reference to the same and additional points and that upon a hearing upon such additional applications the matter would be further considered, but the opinion leaves no doubt that upon the showing upon the applications before the Commission in connection with the remand of the case that the 4th Section had been considered, and the decision was the denial of relief under Section 4 as well as under Section 3. Further reference is made by counsel in the supplemental brief that the Director General does not apprehend that this Court will seek to extend to the determination of the question of what was the legally applicable rate for the past, the language used by this Court with reference to the Commission's power for the future, "and which was, even in that connection of questionable accuracy." The language of this Court in the Nashville Case applies, we submit, to the interpretation of the 4th Section in all cases irrespective of whether it is specific as to rates for the future or rates in the past which have violated the Act. The language of the interpretation is that after a date fixed by the statute, certain character of rates cease to exist, to-wit, those charging a higher rate for the

intermediate haul than for the more distant haul where no application has been made and granted.

The language is neither "of questionable accuracy" nor does it apply more to rates that are to be charged in the future than to those that have been charged. It applies to all charges of the prohibited class.

We submit that the record in this case shows that the rates in question were attempted to be initiated after the expiration of six months after the amendment of the 4th Section of 1910, and that no application had been made to the Commission and no order granting permission to establish or charge any such rate to the intermediate point. Such rate had no force ad initio, and anyone who had been compelled to pay any higher rate than was established to the more distant point had his remedy by collection of the amount charged over that which the law said could be charged. It could make no difference under the interpretation placed on the statute in the Nashville Case whether the particular controversy referred to rates contemplated for the future or those which had been charged in the past. After the decision in the Nashville Case any shipper between the points in the Nashville Case who had been charged the higher rate than this Court said was lawful could recover the amount by which he had been charged illegally.

The interpretation of the 4th Section as contained in the Nashville Case automatically disposes of counsel's

contention that there was no violation of the Act until a shipment had been made and proven to the more distant point, for the higher intermediate rate never went into effect.

The only contention of counsel which is not disposed of by this decision is the contention that the Director General is not subject to the provisions of the 4th Section.

DIRECTOR GENERAL WAS SUBJECT TO THE FOURTH SECTION

It is argued in the supplemental brief that the Director General was not subject to the provisions of the Fourth Section. Section 10 of the Federal Control Act provides "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal law or at common law, except insofar as may be inconsistent with the provisions of the Act or any other Act appplicable to federal control, or with any order of the President. Actions at law or suits in equity may be brought by it against such carriers and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" * * *

The argument of counsel that the Director General is not subject to the 4th Section is based entirely upon

the ground that the Director General was an agency of the Government. The provisions of the 4th Section were not inconsistent with the powers conferred upon the President, and in fact the Director General considered himself subject to that Section. He applied in all cases where he desired to depart from the 4th Section to the Commission for relief from that section, and while 4th Section Order No. 7361 was not and is not in the record in this case, it is quoted on page 84 of the supplemental brief and it appears from the second paragraph of the recitals that the Director General had applied for relief from the long and short haul clause in so far as it was necessary to permit the rates increased by General Order 28 to go into effect. The Interstate Commerce Commission considered the Director General subject to the 4th Section, as shown by its opinion in Johnson vs. A. T. S. F. Ry. Co. (51 I. C. C. 356), noted by counsel in his supplemental brief at page 78, in which the Commission directly held that the application of the 4th Section did not interfere with the unified co-ordinated national control or in anywise hinder the prosecution of the war. This decision was rendered early in the period of Federal control, to-wit, November 11th, 1918. Criticism of this decision is made by counsel, because it is contended that the Director General was not a party to the case, which counsel characterizes as "extraordinary". However in a case decided approximately at the same time, November 15th, 1918, and immediately following it in the report in the same volume at Page 364, in which the Director General was made

a party, and in which the Director General appeared by R. Walton Moore, the Director General apparently considered himself subject to the 4th Section, for he did not even request argument on this question or make any objection on the ground, and in the Commission's decision it reaffirmed its opinion on this identical question announced in Johnson vs. A. T. & S. F. Ry. and apparently throughout the period of Federal Control no objection was ever made as far as we have been able to discover, on the ground which counsel now refers to as extraordinary on the part of the Commission. The Director General considered himself subject to the 4th Section, acted thereon by applying for relief and raised no question as to his obligation to secure the order of the Commission in the event he desired to charge more for the shorter than for the longer haul over the same route.

In addition, we submit that the language of this Court in the case of Mo. Pac. vs. Ault, 256 U. S. 559, decided June 1st, 1921, interpreting Section 10, is very pertinent:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such right or remedies might interfere with the needs of federal

operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analagous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore".

And again, at Page 560:

"The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the government was operating the system, the 'carrier while under federal control' was nevertheless to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts" * * *

It is true in that case the Court held that the government was not liable for penalties under a state law, but was liable for damages which might reasonably in-

clude interest and costs, and this decision is examined and followed in the very recent case of Director General vs. Kastebaum, decided November 12, 1923, 44 Supreme Court Reporter, 52, wherein the Director General was held liable for damages for false imprisonment, and in that decision the Court, speaking through the chief justice, said:

> "The government under Section 10, in the case of false imprisonment stands exactly as if it were a railroad corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown as without probable cause, and made by one of its detectives employed to protect the property entrusted to its care as a common carrier."

It is suggested on Page 77 of the supplemental brief as one of reasons why the 4th Section did not apply to the Director General was that competitive conditions were eliminated by federal control which were at the bottom of the evil aimed at during private control. That fact is more of an argument for the Director General being subject to the 4th Section than not, for the only reason for permitting a greater rate for the shorter haul was competitive conditions, and the elemination of competitive conditions eliminated any reason for the Director General establishing any higher rate for the shorter

haul, and hence is more of an argument in favor of the inhibition of the 4th Section against the Director General than of the fact that he could arbitrarily make a higher charge for the shorter haul than for the longer. It was certainly not the purpose of Congress to arbitrarily put in the hands of the Director General an instrument which with transportation competition eliminated could only be a means of killing business, and no such arbitrary power was certainly intended, for under the existence of federal control the only purpose of establishing such a rate would be to kill the business to the shorter point to the advantage of the longer point. The intent of the Federal Control Act was diametrically the opposite, for any rate established by the Commission was subject to the jurisdiction of the Interstate Commerce Commission—the only limitation upon it was that pending the investigation and decision the rate should not be suspended—it did not legalize the rate which might thereafter be found on investigation to be illegal, and it did not take out of the jurisdiction of the Court and place in the Commission jurisdiction of any question which had previously by existing law been lodged in a court.

The discussion of the supplemental brief is apparently made as a general discussion of the law without any particular reference to the record in this case. The dis-

cussion continually refers to the 4th Section order of the Interstate Commerce Commission, No. 7316, and the same is set out as an appendix to the brief. Neither this order nor the application thereof was offered in evidence and is not before this Court.

We respectfully submit that the judgment of the lower courts should be affirmed.

JAMES G. WILSON,
Attorney for Respondent.

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No. 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, PETITIONER,

v.

PORTLAND SEED COMPANY, RESPONDENT.

UPON WRIT OF ~~ERROR~~ certiorari TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE. WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

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REASONS FOR AND SCOPE OF SUPPLEMENTAL BRIEF.

This supplemental brief upon behalf of the petitioner, James C. Davis, Agent of the President and Director General of Railroads, is necessary for the following reasons:

(1) To place before the Court a somewhat different construction of the fourth section with reference to

damages than that set forth in the brief heretofore filed upon behalf of the petitioner but prepared by counsel for the carrier formerly under Federal control, the Oregon-Washington Railroad & Navigation Company.

(2) To place before the Court certain additional reasons why the Director General should not be held subject to the fourth section.

(3) To point out to the Court certain deficiencies in the record before the Court which may prevent the Court from considering facts of the utmost importance, and of which the Court should be advised in order that the Court may properly delimit its decision on this record so as to avoid any possibility of prejudicing a consideration of such facts if properly presented on other records.

This case involves alleged violations of the long-and-short-haul clause of section 4 of the Act to Regulate Commerce, in connection with two shipments of alfalfa seed, both originating at Roswell, New Mexico, and being consigned, respectively, to Yakima and Walla Walla, Washington, the first being shipped on December 19, 1918, and the second on January 4, 1919. Charges were collected on the published through rate of $2.44 per hundredweight. There was contemporaneously in effect from Pecos, Texas, a point more distant from both Yakima and Walla Walla than Roswell, New Mexico, a rate of $1.51½.

At the outset, and before undertaking to discuss the proper construction of the fourth section or its

application to the Director General, it is desired to point out to the court the deficiencies of this record.

This record fails to show affirmatively, what was the fact, that from and after June 25, 1918, the Interstate Commerce Commission had by its fourth section order 7316 granted relief to the Director General from the provisions of the fourth section under the powers conferred upon the Commission by the first proviso of that section

> from time to time (to) prescribe the extent to which such designated common carriers may be relieved from the operation of this section,

and that reference to the Commission's order appeared on the face of the tariffs themselves.

There is appended to this brief a copy of this fourth section order of the Commission.

It should be noted, moreover, that while this fourth section order was not made part of the record in the District Court, some intimation of it apparently was given to the Circuit Court of Appeals, as appears from the decision of that court. (Tr. 51.) It would seem, however, that the order was either not clearly put before the court, or the court did not clearly understand it. In any event, the court held that, since it had not been considered by the lower court, it was not before the Court of Appeals for decision. The Director General is not advised whether, under the peculiar circumstances of this case, this Court will take judicial notice of this order. The existence or nonexistence of such an

order, however, may well be, as will subsequently appear, of controlling effect in determining whether damages should be awarded in connection with the fourth section, and as this case is but one of a considerable number of cases which are now or will shortly be before this Court, it is essential to refer to the order, if for no other purpose than to distinguish those cases where it properly appears of record.

Likewise it might seem that, since it is the Director General's contention that he was not subject to the fourth section, it would be superfluous for him to discuss the question of damages under that section. The Director General, however, believes that nothing will more clearly serve to demonstrate that the fourth section could not have been applicable to him than a correct understanding of the meaning of that section, and of what Congress intended to accomplish by it. Therefore, before discussing the applicability of the fourth section to him, the Director General will seek to make clear what he believes to be the proper construction of that section, since by so doing it must become obvious that the provisions of that section are necessarily in direct conflict with the power to initiate rates conferred upon the President by the Federal Control Act, and by the President delegated to him.

Moreover, as this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in

excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth section as a whole, and of its interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as shown by various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, first be discussed, and then the question as to whether the Director General was subject to that section.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the respondent (hereinafter referred to as the plaintiff), and the theory of both the District Court and of the Circuit Court of Appeals, is that the rate legally applicable between Roswell and Walla Walla, and the rate which the carrier, therefore, should have collected, was not the higher rate actually published in the tariffs between Roswell and Walla Walla,[1] but was the lower rate published in the tariffs from Pecos, the more distant point, to Walla Walla. In other words, it is the plaintiff's contention, and the theory of both courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section to the tariffs, the higher rate actually published from Roswell to Walla Walla becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect be treated as actually published from that point and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published between Roswell and Walla Walla was a

[1] For convenience reference will be made here only to the shipments from Roswell to Walla Walla, the situation as to the two shipments in relation to the fourth section being similar.

straight overcharge above what is contended to be the only legally published rate, the lower rate from Pecos to Walla Walla, though this latter rate was never actually published from Roswell.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct conflict with what would seem to be the conclusion necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected under all circumstances.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument

what he contends to be the correct construction of the fourth section with reference to damages, before attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of the Commission. For convenience the fourth section has been appended in full to this brief.[2]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as follows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or because greater than the aggregate-of-intermediates, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter

[2] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(a) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates

clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate from or to (as the case may be) the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the

point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, and while the record fails to show, what was the fact, that the Commission had relieved the Director General from the operation of the fourth section and that the tariffs themselves actually bore a reference to the

Commission's order, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the Director General to rebut what might otherwise be contended, that the rate from Roswell for the shorter distance was prima facie unreason-

[4] Again, for the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the joint brief heretofore filed attacks the jurisdiction of the court in this respect.

able because of the lower rate for the longer distance from Pecos.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate from Roswell, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the District Court and the Circuit Court of Appeals, that the higher rate actually published from Roswell to Walla Walla, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect, be treated as actually published from that point, and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally

collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrates the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by, mere *publication* of a rate, but forbids, and is violated only by, the *charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from Roswell to Walla Walla to be read out of the tariffs, there is not provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section which will warrant *reading into the tariffs* the lower rate published solely from Pecos to Walla Walla, so as to treat it as if actually published from Roswell to Walla Walla. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged

too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor

either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the

higher rate actually published between Roswell and Walla Walla out of the tariffs, and to permit the carriers to charge between Roswell and Walla Walla the lower rate actually published only from Pecos to Walla Walla, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for such transportation of * * * property * * * between the points named in such tariffs *than the rates*, fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified*,

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges

upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from Roswell to Walla Walla, and to charge only the lower rate actually published from Pecos to Walla Walla, is afforded if the Director General be correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate between Roswell and Walla Walla could be ignored,

since so far as this record goes there is nothing to show that there had been any actual movement from Pecos to Walla Walla and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation

resting upon the carrier to collect the published rate, even though it violates the fourth section.

The case of *United States* v. *Louisville & Nashville R. R., supra,* is cited on page 37 of the brief of the respondent, and the following language is quoted from pages 322 and 323 of that decision:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on application made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases,* 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.)

The respondent completely and blandly ignores the context in which this language was used. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above, but which the respondent did not italicize in its brief, clearly implies the Court's recognition of the fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, nevertheless, to continue in force until changed as provided by

law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand, the *Piper case*, which is not even cited by the plaintiff (respondent) in its brief, might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from ~~San Francisco~~ Roswell to ~~North Portland~~ Walla Walla violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the shipper, although the form of the bill of

lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published between Roswell and Walla Walla and read into the tariff the rate actually published only between Pecos and Walla Walla without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*, consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a

> lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth

section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

Mississippi Valley Iron Co. v. *Director General*, 74 I. C. C. 715.

Wilson & Co. v. *Director General*, 74 I. C. C. 555.

In certain of these decisions it is true that the Commission granted reparation because it found the rates otherwise unlawful. In certain of them, moreover, as will subsequently be pointed out, the Interstate Commerce Commission was itself in error in holding the long-and-short-haul clause violated, since in none of them was there any proof that the lower rate for the longer distance was actually charged and received. Likewise, in certain of them the Commission's own records should have shown that the departures from the long-and-short-haul clause of fourth section were protected by the Commission's fourth section order 7316.

The significance of these cases, however, in connection with this portion of the argument is that whether the Commission was right or wrong in holding that the fourth section was violated, the Commission still held that the higher rate at the intermediate point was the legally applicable rate, even where the Commission awarded reparation because the legally applicable rate was otherwise unlawful.

The grounds upon which the Commission recognizes that section 6 must be construed as mandatory in requiring the collection of the legally published rate, whether or not that rate be unlawful under other sections of the Act, are well set out in the Commission's decision in *Crescent Coal & Mining Co.* v. *C. & E. I. R. R. Co.*, 24 I. C. C. 149, pp. 156, 158. The Commission there says:

> The sole question to be determined in the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate *under other sections of the act* with its *legality* under section 6. For example, a rate unreasonably high and unlawful in the sense of section 1 may, nevertheless, be the legally established standard and rule of action under section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute. This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether

knowingly in the usual course or inadvertently or for collusive or other improper purposes.

* * * * *

In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * *

> *This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law, but with the only construction which will preserve the chief function of section 6*, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the decision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate

under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 12.) It will suffice to say here that the right of a court to award damages for violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the

fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the Court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between

given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. More extended reference will subsequently be made to the Congressional Debates in connection with the amendment of the fourth section in 1910, in order to show so far as possible what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates

clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point andby taking constructive possession of a shipment and rebilling it to its ultimate destination, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more

distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails

to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of

that section[6] and that where such relief is granted a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause have frequently been expressed.

section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The controlling importance, however, of this distinction is well illustrated by this very case. While here, as already explained, the record fails to show what was the fact, that is, that the Commission had actually issued an order relieving the Director General on and after June 25, 1918, from the operation of the fourth section, and that the tariffs on their face bore reference to this order, the record still fails

to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published to North Portland, was ever actually charged and received. In other words, the defect of this record in failing to show relief from the fourth section becomes unimportant, since, as there was no actual departure from the long-and-short-haul clause, there was no necessity for relief.

Nevertheless, a consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose on the one hand that the practically penal provisions of the fourth section should not be held applicable to the Director General, while on the other hand that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates,

even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points in La. & Tex.*, 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Anaconda Copper* cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage which it would have applied in the absence of any supposed violation, and had the question merely been as to whether damage had otherwise been proved under the first, second, or third sections of the act. This is clearly shown by the two majority reports of Commissioner Hall in the *Iten Biscuit* case and by the dissenting report of Commissioner Harlan in the *Oregon Fruit* case, which was directed to the report in the *Iten Biscuit* case as well. It is to be noted in this connection that Commissioner Harlan erroneously assumed, as did the majority, that an actual violation of the long-and-short-haul clause was involved, and on that assumption his criticism of the decision of the majority as failing to give any force whatever to the express provisions of the long-and-short-haul clause of the fourth section itself is un-

deniably sound. Commissioner Harlan says in the *Oregon Fruit* case, 50 I. C. C. 719, at page 723:

> The majority report nevertheless does not even place upon the carriers at fault the burden of showing that the higher rates at the intermediate points were reasonable and nondiscriminatory, but leaves upon the complainant the burden of supporting its claim for reparation by showing the rates to have been unreasonable or unjustly discriminatory, *precisely as if there were no fourth section at all in the act to regulate commerce.*

That Commissioner Harlan was not in error as to the theory of the majority—that is, that a violation of the fourth section does not involve any different criteria of damage than a violation of the first, second, or third sections—is fully confirmed by the specific holding of Commissioner Hall to this effect, noting on page 733 that the higher rate for the shorter distance was not itself unreasonable. Commissioner Hall had said on page 732, with reference to the decision of this court in the *International Coal* case, 230 U. S. 184:

> While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

And again on page 733:

> Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3

> there must be proof of damage and under section 4 the departure therefrom is of itself proof of damage.

It should be noted that in the latter quotation from Commissioner Hall's report he assumes that the only alternative to holding that for violations of section 4 there must be the same proof of damage as required by the *International Coal* case for violations of sections 2 and 3, is to hold that under section 4 the departure therefrom is of itself proof of damage. In this Commissioner Hall was doubtless misled by the contention of the complainants in that case, noted at page 731 of his report, where he says:

> With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate charged for the longer distance, and that this pre-

sumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under all circumstances be collected. On the one hand,

therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section 4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial, is to give no effect whatever to the express declara-

tion of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what constitutes violation under the aggregate-of-interme-

diates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does NOT consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-short-haul clause does not make the charging of the

lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the violation can not be avoided except by charging the

same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of damage must be the difference between the higher

published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under sections 1, 2, or 3 had the aggregate-of-intermediates

clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation

of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the pre-

sumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable

80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar circumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual

violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what

profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a

penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act. Were it a penalty it clearly would not have been applicable against the Director General. *Mo. Pac. R. R. Co.* v. *Ault*, 256 U. S. 554. Nevertheless, while it is not a penalty, the Director General submits that the public wrong aimed at was one of which it could not be presumed the government itself would be guilty in the operation of the railroads, but rather a wrong incident to the stress of competition under private control. Therefore the Director General contends that the harshness of the rule of damages under the fourth section flowing from the nature of the public wrong at which that section was aimed during private control serves to make clear that that section itself should not be held applicable to him.

Before discussing this ultimate contention, however, it is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that, even if the almost penal provisions of the fourth section be held—as they should be—inapplicable to the Director General, the shippers still have protection against the charging of a higher rate for a shorter distance, or of a higher through rate

than the aggregate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 6 to 13 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 10 to 13. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual

violation of the long-and-short-haul clause, because of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because

greater than an existing combination, but that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged

and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since it neither proved nor attempted to prove that any shipments ever moved from Pecos upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not purport to cover any incidental damages for viola-

tions of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

It remains to consider whether the fourth section itself can be held applicable to the Director General.

IV.

The Director General should not be held to have been subject to the fourth section.

It has already been suggested that the proper construction of the fourth section with reference to damages for actual violations thereof tends strongly to show that that section could not have been intended to apply to the Director General because of the harshness of the rule of damage necessitated by conditions of private control. Furthermore, it has been noted that questions have at least been raised as to whether or not the Commission has power under the first proviso of the fourth section as amended in 1910 to relieve a carrier from the operation of the aggregate-of-intermediates clause, or whether that power is confined to relief from the long-and-short-haul clause.[8]

[8] Chairman Mann, of the Interstate Commerce Committee of the House, expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation, to authorize a company to charge less for the long haul than they do for the short haul." Pages 4579, 4580, Congressional Record, April 12, 1910.

It will be noted that the first sentence above quoted applies to both clauses of the fourth section, while the second sentence refers spe-

If this power does not extend to the aggregate-of-intermediates clause, further argument is furnished why the fourth section should not be held applicable to the Director General. It would impose upon the government under the aggregate-of-intermediates clause, practically absolute liability for damages from which the Commission would be powerless to relieve it, such stringent liability having been imposed upon private carriers because of abuses incident to competition under private operation without any analogy under Government control.

Again, it has been argued by the plaintiff and by shippers generally that, even if the Commission has power to relieve from both clauses of the fourth section, it can not grant such relief by any such blanket order as it actually made in the case of the Director General. (See its fourth section order 7316 in the Appendix.) Assuming this to be so, it would but make still more clear the impropriety and injustice of attempting to apply the fourth section to the Director General. It would mean that the Director General or, in other words, this government, faced with a tremendous war emergency, demanding an immediate increase in revenue in order, as the President's proclamation recites, to provide for the carrying on of essential transporta-

cifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand, the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

tion for war purposes, could obtain no practical relief from the Commission from violations of the fourth section surviving over from private control, and involving, if no relief should be obtainable, substantial reductions in revenue, since the emergency made it impossible to investigate each rate and each tariff, and therefore to enter a separate order as to each.

All these considerations, however, are but inducements leading up to the fundamental and insurmountable objection to any attempt to apply the fourth section to the Director General; that is, that the application of that section to the Director General would be in direct and inevitable conflict with the power conferred upon the President by section 10 of the Federal Control Act—

> that during Federal control, whenever in his opinion the public interest requires, *the President may initiate rates*, fares, charges, classifications, regulations, and practices, *by filing the same with the Interstate Commerce Commission*, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

There is nothing ambiguous about the power conferred upon the President under section 10. It is unrestricted power to initiate rates *by filing* them with the Interstate Commerce Commission. There is no limitation upon the character of the rates to be initiated, and there is specific provision against the Commission suspending their effectiveness after

they are so initiated. Yet if the fourth section be applicable to the Director General, the President, through the Director General, could not by filing a rate with the Interstate Commerce Commission have initiated a rate, the collection of which would violate the provisions of the fourth section, so as to render such a rate a lawful rate free of any ultimate liability, without first obtaining the permission of the Interstate Commerce Commission for such filing, and therefore for such initiation.

That the fourth section as amended in 1910 was specifically intended to and did deprive the carriers of the power to initiate such rates can no longer be a matter of speculation or construction. In the *Intermountain Rate Cases*, 234 U. S. 476, this court, speaking through the late Chief Justice, at pages 482 to 486, said:

> Almost immediately after the adoption of the Act to Regulate Commerce in 1887 (February 4, 1887, c. 104, 24 Stat. 379) the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long-and-short-haul clause *and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions* and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which ma-

terially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. *We say primarily, because, of course, it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission* in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were, therefore, operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction being authorized could not be a preference or discrimination, and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin. (Pages 482, 483.)

* * * * *

It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary

judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. *It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review.* And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long-and-short-haul clause it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. *Texas & Pac. Railway* v. *Interstate Com. Comm.*, 162 U. S. 197, 218.

With the light afforded by the statements just made, we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short-haul clause in a sense unqualified except

in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short-haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function.* In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist*, because to do so, in the absence of some authority, would not only be inimical

> to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. *But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission*, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections. (Pages 483, 484, 485, 486.)

Had Chief Justice White been passing specifically upon the question of the propriety of the application of the amended fourth section to the Director General, he could not have stated more conclusively the insurmountable objections to any such application. It will be noted, from those portions of his opinion which have been here italicized, that the provisions of the fourth section prior to its amendment in 1910 would have been entirely consistent with the unrestricted power conferred upon the President to ini-

tiate rates of any character. It will be observed that Chief Justice White construed the fourth section prior to its amendment as leaving to the carriers the primary right to initiate such rates—

> subject to the subsequent supervision and control of the Interstate Commerce Commission and to ultimate judicial review.

On the other hand, it will be observed that because of the abuses, or supposed abuses, by the carriers in the exercise of this primary judgment Congress—

> shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of the public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist. * * * But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted.

This being so, the Director General in the operation of the carriers during Federal control must be held to have been exempted from the amended fourth section of the Interstate Commerce Act by the

express provision of section 10 of the Federal Control Act that—

> carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, *except in so far as may be inconsistent with the provisions of this act* or any other act applicable to such Federal control or with any order of the President.

It would be superfluous, therefore, to indulge in any further argument to demonstrate that section 4 as amended is in direct and necessary conflict with the power conferred by section 10 itself upon the President to initiate rates. It, however, may do no harm to suggest why, in any event, it could not reasonably be assumed that that section as amended was intended to apply to the Director General. The amendment was, as already stated, directed to the abuses by private carriers, perhaps less serious than represented to Congress, in the initiation of such situations under the stress of competitive conditions under private operation. It certainly can not be presumed that Congress would impute to the President or the Director General either ulterior motives in initiating such rates or be unwilling to trust the judgment of the President or of the Director General in the first instance. Furthermore, competitive conditions were eliminated by Federal control, which were at the bottom of the evil aimed at during private control. Moreover, without the amendment of 1910 and as section 4 had previously stood, sup-

ported as it was by sections 1, 2, and 3, the President's initial power would have been, like the carriers', in any event, subject to the ultimate review and control of the Commission. The Director General then believes it impossible to reach any other conclusion than that section 4 as amended in 1910 was inapplicable to him.

Curiously enough, however, the Interstate Commerce Commission has itself concluded to the contrary, in the case of *Johnson* v. *A. T. & S. F. Ry. Co.*, 51 I. C. C. 356. More extraordinary still, the Commission undertook to determine a question of this great importance to the Director General in a case to which he was not even a party and in which he had no representation by counsel or otherwise, and over the protest of the then chairman of the Commission, Mr. Daniels. The Commission said, p. 361 of its opinion:

> Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the federal control act of March 21, 1918, and the full exercise of power conferred thereby. That act expressly provides that rates initiated by the President "shall be reasonable and just." Under section 4 of the act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned, and the burden is placed upon

the carriers of showing that the situations apparently within the scope of the prohibition are in reality "special cases," justifying the exercise by us of a sound, legal discretion in authorizing departures from the general rules laid down. *It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control or in any wise hinder the prosecution of the war.* As the situations covered by the fourth section can be reached by orders under the first three sections of the act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroads and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us fourth section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

The act to regulate commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the federal control act or other acts applicable to federal control or with any order of the President. There has been no order of the Presi-

> dent in the exercise of his war powers declaring that the enforcement of section 4 interferes with the efficient operation of railroads and systems of transportation under federal control. Clearly no such declaration is contained in the act itself, and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of section 4 it must be presumed that language appropriate to that end would have been used, as was done with the power of suspension under section 15.

It can only be said with reference to the Commission's foregoing expression of opinion on this question that, had the Commission chanced the possible benefit of an expression of the Director General's views in the premises, the Commission, at least, would not have been permitted to labor under the singular misapprehension indicated in the portion of its opinion first italicized, where the Commission states:

> It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control, or in any wise hinder the prosecution of the war.

Even, however, without the benefit of the Director General's views on the fourth section, it is impossible to conceive how the Commission could have supposed for a moment that anyone would seriously contend that the enforcement of the fourth section could "interfere with unified, coordinated national control."

On the other hand, the enforcement could conceivably "hinder the prosecution of the war," by depriving the Director General of essential revenues. The Commission, however, not only does not attempt to deny, but even fails to mention, that at least a conceivable, or, as has been shown here, an inevitable, result of the enforcement of section 4 against the Director General would be to deprive the President of the unrestricted power conferred upon him by section 10 of the Federal Control Act to initiate rates by merely filing them.

In fact, the only portion of the Commission's opinion which does not afford its own answer is the last sentence quoted above. Superficially it might seem that since Congress in the Federal Control Act specifically provided that—

> said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination—

and thereby expressly exempted the Director General from the power the Commission had under section 15 of the Interstate Commerce Act to suspend rates published by a carrier, Congress would, had it intended to set aside the provision of section 4 of the Interstate Commerce Act as against the Director General, have provided like specific exemption. That no such deduction is justified, however, readily appears when it is understood that the power of the Commission to suspend rates already initiated would still have been consistent with the unrestricted power in the Director General to initiate rates by merely filing

them. Therefore it was necessary for Congress, if the Commission were not to exercise its power to suspend under section 15 of the Interstate Commerce Act as against the President, to exempt the President expressly from the Commission's power in this respect. On the other hand, it was unnecessary, and would have been superfluous, to exempt the President expressly from the requirement of section 4 that application must be made to the Commission for relief from the provisions of the fourth section before lawful rates could be filed involving departures from the provisions of that section, since this was inevitably in conflict with the unrestricted power conferred upon the President under section 10 of the Federal Control Act to initiate rates by merely filing them with the Commission.

The Director General, therefore, submits that, for the reasons specified in this brief, as well as for the additional reasons furnished by the brief heretofore filed in his behalf, this court should reverse the judgment of the Circuit Court of Appeals.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Petitioner.

WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

* * * * *

FOURTH SECTION ORDER NO. 7316—GENERAL NO. 17.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 27th day of May, A. D. 1918.

Whereas, The President of the United States, through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General:

And Whereas, The said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provision of section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules containing rates, fares, charges, or classifications

containing departures from aforesaid provisions of section 4, enabling carriers under federal control in the present emergency to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918:

It is ordered, That in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges, and classifications which exceed the aggregate of the intermediate rates, fares, charges, and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges, and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce.

And it is further ordered, That carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges, and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director

General without observing the provisions of the fourth section of the act to regulate commerce.

It is further ordered, That this order shall supersede and take the place of any provision or provisions of any fourth section order or orders heretofore issued that may be in conflict herewith.

The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges, and classifications being subject to complaint, investigation, and correction if in conflict with any provision of the act.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

NOV 5 19
WM. R. STAN

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. [redacted] 114

JAMES C. DAVIS, Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals of the 9th Circuit.

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HOUGHTON-CARSON COMPANY, PRINTERS

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In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 573.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals of the 9th Circuit.

STATEMENT OF THE CASE.

This case involves a violation of the long and short haul clause of the Interstate Commerce Act arising by reason of two shipments of alfalfa seed, both of which originated at Roswell, New Mexico, one destined to Yakima, Washington, the other to Walla Walla, Washington. They both moved over the lines of the A. T. & S. F. from originating point to Denver, Colorado, thence via the Union Pacific Railroad, Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation line to destination. These shipments were charged for at the rate of $2.44 per cwt. At the same

time the shipments moves there was in effect a rate from Pecos, Texas, to the same points of destination of $1.51½ per cwt. on the same commodity over the same route. Pecos, Texas, is a point on the A. T. & S. F. Railway System on the same line as Roswell, New Mexico, but further distant from Yakima and Walla Walla than Roswell, and shipments from Pecos, Texas, to said destinations move through Roswell, New Mexico.

There is no dispute between the parties as to the shipments being made, nor as to the amount of the recovery if the petitioner is entitled to recover anything. The District Court gave judgment for $379.09, the amount of the overcharge on the Yakima shipment, with interest from the date of payment; and $177.87, the amount of the overcharge on the Walla Walla shipment, with interest from date of payment; and $175.00 attorney's fees and costs. The Circuit Court of Appeals affirmed the judgment with $100.00 additional attorney's fees.

This case was consolidated with and tried both in the District Court and in the Circuit Court of Appeals, in connection with two cases now here on writ of error, one being The San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error, No. 594; and James C. Davis, Plaintiff in Error, vs. A. J. Parrington, De-

fendant in Error, No. 595' of the October, 1922, Docket, and practically all questions involved in this case should be determined and controlled by the decision of this court in the two cases named, which have not as yet been argued. We will therefore not make any extended argument in this brief, as it would be but repetition of our argument in the two cases just named.

ARGUMENT.

I.

The District Court had original jurisdiction in this case. This question has been fully argued in the briefs in Docket Numbers 594 and 595.

The 4th Section of the Act to Regulate Commerce at the time the shipments here involved moved prohibited the charging of greater compensation for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer, except upon application to the Interstate Commerce Commission for an order prescribing the extent to which the carrier may be relieved from the operation of said section, and it has been held that the amendment of this section of 1910 made the prohibition of the 4th Section absolute, and that after the time fixed

by the section the existing rate to the shorter point was illegal unless permitted by a special order of the Interstate Commerce Commission.

Inter Mountain Rate Cases 234 U. S., 476, 482, 484.

U. S. vs. Louisville & Nashville, 235 U. S. 314, 322.

Skinner & Eddy. Corp. vs. U. S. 249 U. S., 566.

Where there is no administrative question involved it is not necessary to submit the question to the Interstate Commerce Commission, but action may be brought directly in court.

Penn. R. R. Co. vs. International Coal Co., 230 U. S., 184.

Penn. R. R. Co. vs. Puritan Coal Co., 237 U. S., 121.

Penn R. R. Co. vs. Sonman, 242 U. S. 120.

St. Louis, Iron Mountain & Southern Railway Co. vs. Hasty, 255 U. S., 252.

Great Northern Railway Co. vs. Merchants Elevator Co., 259 U. S., 285, 296.

Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the Act causes to be done or permits to be done any act, matter or thing in said act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in said act required to be done, such common carrier shall be liable to the person or persons injured thereby to the full amount of damages sustained in consequence in violation of the provisions of said act, together with reasonable counsel's or attorney's fees to be fixed by the Court in every case, which attorney's fees shall be taxed and collected as a part of the costs in the case.

Section 9 of the Act gives the right to any person claiming to be damaged to make complaint either to the Commission or to bring suit for damages in the District Court of the United States.

In the present case the record shows a rate of $1.51½ established from Pecos, Texas, to Walla Walla and Yakima (Tr. P. 27). It shows that Pecos, Texas, is on the system of the Atchison, Topeka & Santa Fe south of New Mexico. Roswell, New Mexico, is on the same line of this system and intermediate between Pecos and the destination points over the route which the shipments in question moved. The rate charged on the shipments from Rosswell was $2.44 per 100 pounds, being a combination of local rates; that the carriers made a charge of 92c per 100 pounds on these shipments

more than the rate established by them from Pecos, Texas, over the same line or route to the same destinations. There was no pretense in the record that any order of the Interstate Commerce Commission had been passed permitting such higher charge from the intermediate point. The rules of the Interstate Commerce Commission require any such order to be referred to on the title page of the tariff and no such reference on the tariffs in question was shown (Tr. P. 28), and no order of the Commission was offered in evidence to justify the higher rate from the intermediate point.

II.

THE EFFECT OF THE FEDERAL CONTROL ACT AND TRANSPORTATION ACT

It is argued on pages 29 to 37 of brief of petitioner that inasmuch as when the carriers were taken over by the Railroad Administration the rates of the carriers on file with the Commission were continued in effect and an order in June, 1918, was made increasing the rates in effect 25 per cent. that thereby the violation of the long and short haul clause of the 4th Section of the Act was validated, notwithstanding the fact there had been no special order by the Commission permitting the particular violation. This argument is based upon the exception in Section 10 of the Federal Control Act

making all carriers while under federal control subject to laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provision of said act, or any other act applicable to such federal control or with any order of the President.

We submit however, that this question is not raised by the record. The only objection made to the complaint was by demurrer on the ground that the court had no jurisdiction of the subject matter of the action, and in this demurrer it it was specified that in presenting the demurrer the defendant would rely upon the proposition that the Interstate Commerce Commission has exclusive original juisdiction of controversies of this character (Tr. P. 13). The answer was simply a denial. No objection was offered to the introduction of the tariffs showing rates from the more distant point, in fact there was no reservation of the question here attempted to be presented.

Aside, however, from the fact that the question is not raised, we submit that Section 10 of the Federal Control Act did not validate the violation in question. Under federal control it was contemplated that the operation of the railroads should continue the same as before; tariffs had to be filed making changes in rates from time to time in the ordinary course of business. In fact, as appears from Mo. Pac. R. R. Co. vs. Ault,

256 U. S. 560, each system was required to file its own tariffs. The initiation or continuation of a rate in this manner was not an order of the President inconsistent with the Act to Regulate Commerce. On the contrary, it was an express recognition that the provisions of the act governed. The only exception recognized by Section 10 was that any rates initiated by the President should not be suspended pending investigation before the Commission as to their reasonableness or justness. The Railroad Administration recognized that its rates were subject to the long and short haul provision of the 4th Section. It applied in specific cases to the Commission for relief thereunder. When the Railroad Administration by General Order 28 increased all rates in effect 25 per cent. it recognized that certain of said rates were higher for a short haul over the same route than for longer hauls under permits granted by the Commission, and that a percentage increase in the rates would necessarily increase the violation, and to legalize the increase it applied to the Commission for permission to increase this violation necessary to permit the increase to go into effect, and such permission was granted. The character of the violations permitted by this order was specifically called to the attention of the Commission, and the Commission's order was for the purpose of validating such violations as were made or increased by the advance in rates.

The action of the Director General, the agent of the President, in recognizing the fact that the Railroad Administration was subject to the long and short haul clause, is persuasive as a contemporaneous interpretation of the Act. He evidently did not consider that initiation of rates by him on the basis contrary to the Fourth Section without the order of the Commission was necessary to enable him to carry out the Federal Control Act. Not only did the President's agent so interpret the Federal Control Act, but the Interstate Commerce Commission so interpretated it at the time.

In the case of Johnson vs. A. T. & S. F. Ry. Co., 51 I. C. C. 356, 361, the Commission says:

> "Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the Act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the Federal Control Act of March 21, 1918, and the full exercise of power conferred thereby. That Act expressly provides that rates initiated by the President 'shall be reasonable and just'. Under Section 4 of the Act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned and the burden is placed upon the carriers of showing that the situations apparently within the scope of the

prohibition are in reality 'special cases', justifying the exercise by us of sound legal discretion in authorizing departures from the general rules laid down. It is difficult to see how the enforcement of this section can interfere with a unified, co-ordinated national control, or in any wise hinder the prosecution of the war. As the situations covered by the fourth section can be reached by orders under the first three sections of the Act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the Act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroad and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us four-section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

"The Act to regulate Commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the Federal Control Act or other acts applicable to Federal control or

with any order of the President. There has been no order of the President in the exercise of his war powers declaring that the enforcement of Section 4 interfered with the efficient operation of railroads and systems of transportation under Federal control. Clearly no such declaration is contained in the Act itself and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of Section 4 it must be presumed that language appropriate to that end would have been used as was done with the power of suspension under Section 15."

The Director General was not a party to the Johnston case, but in a case arising approximately at the same time in which the same question was involved, and in which the Director General was a party, the Commission reiterates and approves its language above quoted in the Johnston case. Rice Potato Co. vs. B. & O. Rld. Co., 51 I. C. C. 365, 368. This interpretation also seems to comport with the language of this Court in the case of Missouri Pacific Rld. Co., vs. Ault, 256 U. S. 554, 559 as follows:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the

President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabil-

ities and that they might sue and be sued as theretofore. Here the term 'carriers' was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owing or operating them."

This case was an action to recover compensation and a penalty, and while the Court held that the government did not assume to pay penalties, it made clear that it was the purpose of the government to permit itself to be sued on all causes of action for compensatory damages. On Page 563 the Court says:

"By these provisions the United States submitted itself to the various laws, state and federal, which prescribe how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of the claims against the United States arising out of the operation of the railroad were to be determined, but there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty if it should fail to perform the legal obligations imposed. The government undertook as a carrier to observe all existing laws and undertook to compensate any person injured through a departure by its agents or servants from their duty under such law."

And again, on Page 564:

> "The purpose for which the government permits itself to be sued was compensation not punishment. * * * Wherever the law permits compensatory damages they may be collected against the carrier while under federal control. Such damages may reasonably include interest and costs."

And the judgment was reversed only because it included the penalty, for the Court says on Page 565: "The judgment against the Director General so far as it provided for recovery of the penalty was erroneous."

In this connection the language of Section 10 not only expressly subjects the carriers to all laws and liabilities, except such as are inconsistent with the Federal Control Act, or any other act applicable to Federal Control, or with any order of the President, but it further provides that "actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law. And in action at law or suit in equity against the carrier *no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

The Act contemplates as declared by the Ault case that actions against the carrier should proceed the same as before, and in the same Courts, and that the Director General should not defend any action on the ground that he was an agency of the Federal Government. The

object of the legislation was that the Director General's control of the properties should not be interrupted, and this seems to be the interpretation placed upon the Act by the Director General, by the Interstate Commerce Commission, and by all having an interest in the matter.

It is urged in this same connection in the brief of plaintiff in error that the Transportation Act of 1920, Section 206, indicates that the jurisdiction of these matters was transferred from the Court to the Commission, but as we read Section 206 of the Transportation Act, it is a confirmation of the above interpretation of the Federal Control Act, and shows to our mind the intention of Congress that the jurisdiction of all controversies remained in the same Courts or tribunals as before or during Federal Control. The language of the Act is so plain that we submit that it is susceptible of no other interpretation. The District Court in this case (Transcript, Page 18) has outlined the proper interpretation thereof to our mind so plainly as to require no further argument on our part. His language is as follows:

> "It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv.

a, of the act, provides that actions at law, suits in equity and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control.

"As the present actions could have been maintained this court against the carrier if the lines had been in private control at the time the shipments

were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

We submit that neither the Federal Control Act nor the Transportation Act validated the violation of the Interstate Commerce Act and did not change the jurisdiction of the cause from the court to the Commission.

III.

IT IS NOT NECESSARY TO PROVE ACTUAL SHIPMENTS FROM THE MORE DISTANT POINT.

It is claimed that there was no violation of the Act because there was no proof of actual shipments from Pecos to Walla Walla or Yakima. We have in the brief, with reference to Docket Numbers 594 and 595, Page 36 et seq., discussed the question as to the necessity for proof of shipments from or to the more distant point. We deem it unnecessary to repeat that argument at length.

Section 6 of the Act requires the rates established by the carrier to be published and requires all persons to take notice thereof. The law prohibits the establishment of a higher rate from the intermediate point except after hearing before the Commission and an order permitting such departure from the long and short haul

clause, and in U. S. vs. Louisville & Nashville, 235 U. S. 322 and 3 this court has held that after the time limit fixed by the amendment of 1910 any rate from the intermediate point higher than from the more distant point should not "continue in force unless the application to sanction it had been made and granted". The question of any movement under the rate made no difference. The higher rate from the intermediate point was not in force, hence proof of shipments from the more distant point would be superfluous. Furthermore, the courts hold that the establishment of the rate from or to the more distant point and the publication thereof in accordance with law, is in law deemed to be the charging of the rate. Cal. Adj. Co. vs. A. T. & S. F., 179 Cal. 140; 175 Pac. 682; Beeghly vs. Public Util. Comm. (Ohio), 135 N. E. 641. This holding was applied in the lower courts.

IV.

THE DEPARTURES IN QUESTION WERE NOT AUTHORIZED BY THE INTERSTATE COMMERCE COMMISSION.

It is now claimed that the Interstate Commerce Commission 4th Section Order No. 7316 granted authority to the Director General to violate the long and short haul clause in all respects. At the time of the general advance of 25 per cent. in the rate the Director

General requested of the Interstate Commerce Commission, and the Interstate Commerce Commission made an order permitting the increased rates to go into effect notwithstanding the fact that said increased rates in some instances violated the long and short haul clause. This order is set out on pages 42 and 43 of the petitioner's brief. This order was necessary because where violations of the 4th Section existed by reason of orders of the Commission prior to this increase the extent of the violation by the increase in rates was necessarily increased. In other cases violations arose by reason of the rule for splitting of fractions in establishing the increase which made the order necessary, but there was no consideration given to the facts warranting any higher rate to be charged from Roswell, New Mexico, than from Pecos, Texas, to points in Washington. No circumstance of this character was before the Commission or considered by it. The 4th Section of the Interstate Commerce Act permits violations in cases permitted by the Commission, providing . . . "that upon application to the Commission such common carrier *may in special cases after investigation* be authorized to charge less for a longer than a shorter distance for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this Section."

This court has stated in U. S. vs. Merchants Assn., 242 U. S. 187, that this clause "was designed to guard against the issuance by the Commission of general orders suspending the long and short haul clause, and to insure action by it separately in respect to particular carriers and only after consideration of special circumstances existing". No such special circumstances concerning the situation of the rates here involved were before the Commission and no order permitting this violation was ever made. The rate claimed to be increased from Roswell, New Mexico, did not in fact exist at the time of the alleged increase (U. S. vs. Louisville & Nashville, 235 U. S. 322), and the order certainly did not revive a non-existing rate.

This point was not raised in the court below, was nowhere pleaded, no evidence of any order of the Commission was offered in the record, and we submit it is not before this Court for consideration. Robinson vs. B. & O. R. R., 222 U. S. 511. This point was attempted to be raised in the Circuit Court of Appeals by brief filed by Ben C. Dey as amicus curiae, but the Circuit Court of Appeals refused to consider it because not in record (Tr. P. 51).

V.

MEASURE OF DAMAGES.

It is claimed that the measure of damages is not the difference between the rate established from the

more distant point and that charged from the nearer point.

The rate from the more distant point was the only rate in existence. The higher rate from the intermediate point did not exist. U. S. vs. L. & N. R. R. 235 U. S. 314, 322. Any charge therefore, in excess of the established rate from the more distant point was an illegal exaction which the person who has paid is entitled to recover. The Circuit Court of Appeals has applied this measure of damage in Southern Pacific vs. Calif. Adjustment Co., 237 Fed. 954. The Supreme Court of California has likewise applied the same measure of damages in Calif. Adjustment Co. vs. Atchison, Topeka & Santa Fe, 185 Pac. 282, and the Supreme Court of Kentucky in the case of L. & N. R. R. Co. vs. Walker, 110 Ky. 961, 63 S. W. 20, has likewise applied the same measure.

The Interstate Commerce Commission in refusing to grant damages on this basis justifies its course on the language of this court in Penn. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184. This case was an action for damages because one shipper had not received a rebate equivalent to that granted by the railroad company to another shipper who had received a rebate, under the lawful rate, and the court quite properly held that in such case the rebates received under the lawful rate was not the measure of damages. This dis-

tinction is clearly outlined by the Circuit Court of Appeals of the 9th Circuit in Calif. Adjustment vs. S. P. 237 Fed. 965, and this court in the later case of Southern Pacific vs. Darnell Taenzer, 245 U. S. 534, likewise distinguishes the International Coal case.

The respondent here has paid out of pocket cash which the statute says should not be exacted from him. He is to that extent damaged and that is the damage which he is seeking to recover.

VI.

ATTORNEY'S FEES IN THIS COURT.

If the judgment of the lower court is sustained, then this Court should assess as part of the costs, attorney's fees in this Court. Section 8 of the Act provides for the assessment of a reasonable counsel's or attorney's fees to be fixed by the court in every case of recovery, which fees shall be taxed and collected as part of the costs in the case. The District Court limited the attorney's fees to the fees in that court. The Circuit Court of Appeals made an additional allowance for fees in that court and we suggest that similar allowance be made in this court. This seems to be the practice outlined in Mills vs. Lehigh Valley, 226 Fed. 812, and N. Y., N. H. & H. vs. Ballou & Wright, 242 Fed. 862.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed, with addition of attorney's fees in this Court.

Respectfully submitted,

JAMES G. WILSON,

Attorney for Respondent.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

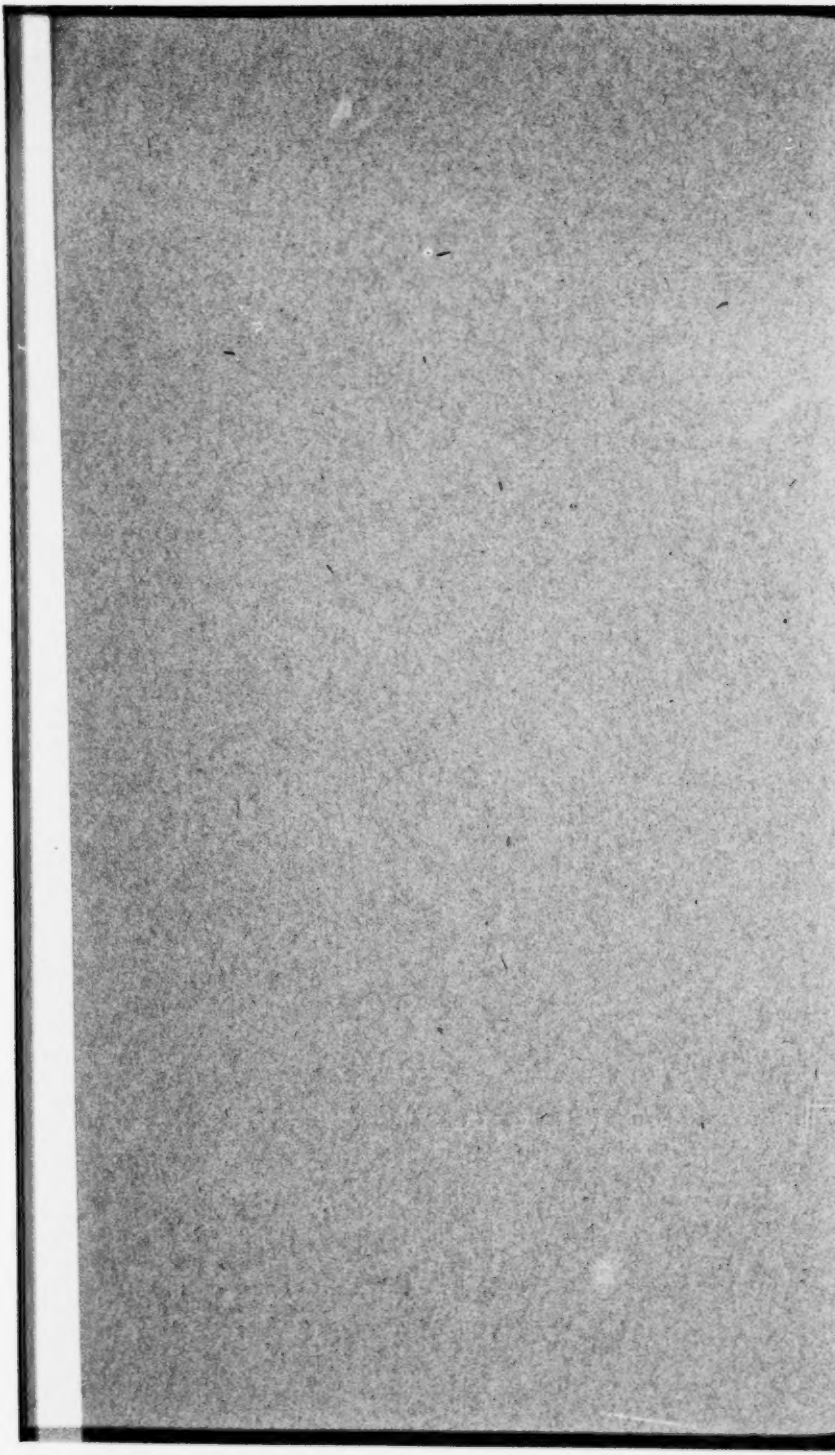
vs.

A. J. PARRINGTON

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED SEPTEMBER 14, 1922

(29,144)



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Names and Addresses of Attorneys of Record.

ARTHUR C. SPENCER, JOHN F. REILLY and CHARLES E. COCHRAN, Wells Fargo Building, Portland, Oregon,

For the Plaintiff in Error.

WILSON & GUTHRIE, Platt Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To A. J. Parrington, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein The San Francisco and Portland Steamship Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of September, in the year of our

Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,
Judge. [1*]

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 28th day of September, 1921.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. L.—8748. United States District Court, District of Oregon. The San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Sep. 28, 1921. G. H. Marsh, Clerk. By ————, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, plaintiff and defendant in error, and The San Francisco and Portland Steamship Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what

of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of September, 1921.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon. [2]

The foregoing writ of error was duly served upon the District Court of the United States for the District of Oregon, by filing a copy thereof with me as the clerk of said court on this 28th day of September, 1921.

G. H. MARSH,
Clerk United States District Court, District of Oregon.

[Endorsed]: No. L.—8748—27—193. In the U. S. Circuit Court of Appeals for the Ninth Circuit. San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed September 28, 1921. G. H. Marsh, Clerk United States District Court, District of Oregon.

In the District Court of the United States for the District of Oregon.

November Term, 1920.

BE IT REMEMBERED, that on the 12th day of February, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

AT LAW.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the plaintiff and for cause of action against defendant alleges:

I.

That the San Francisco and Portland Steamship Company is now and during all the times hereinafter complained of was a corporation organized and existing under and by virtue of the laws of the State of Utah, and was the owner of a line of steamboats or steamships operating via the Pacific Ocean, the

Columbia and Willamette Rivers between San Francisco, in the State of California, and Portland, in the State of Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the said San Francisco and Portland Steamship Company after the [4] first day of July, 1914, which said permission was granted, and thereafter said San Francisco and Portland Steamship Company in reference to the operation of its steamships and steamboats on the line or route aforesaid between San Francisco, California, and Portland, Oregon, has been at all times subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as the railroad controlling said water carrier.

III.

That the Oregon-Washington Railroad & Naviga-

tion Company is, and at all times hereinafter mentioned has been, a railroad corporation and common carrier of freight and passengers, among other places between Portland, Oregon, and North Portland, Oregon; that at Portland, Oregon, the steamship line of the defendant connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company, and the said defendant was operating said line of steamships and steamboats in connection with the line of railroad of the Oregon-Washington Railroad & Navigation Company for the continuous carriage of freight, including sugar, between San Francisco, in the State of California, to points on the line of the Oregon-Washington Railroad & Navigation Company, including North Portland, in the State of Oregon.

IV.

That heretofore and in conjunction with the Oregon-Washington Railroad & Navigation Company, the defendant filed with the Interstate Commerce Commission a schedule of rates contained in Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, Interstate Commerce Commission No. 384, and published the same, and said rates by said schedule established became [5] effective February 17, 1916; that the rate established by said schedule over the line or route of steamships of defendant from San Francisco to Portland, thence via the line of railroad of the Oregon-Washington Railroad & Navigation Company to North

Portland, in the State of Oregon, on sugar in carload lots of the minimum weight of 30,000 lbs., was and is twelve and one-half (12½) cents per hundred pounds, and was continued in force and effect by supplements thereto up to midnight of December 28, 1917, the date on which the operation and control of said lines was assumed by the United States Railroad Administration; that the rate in effect over said line or route from San Francisco to North Portland, from March 1, 1920, to August 25, 1920, as established by Special Supplement No. 14 to said Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, Interstate Commerce Commission No. 384, effective June 25, 1918, and continued in effect after the release of Federal control, was and is the sum of fifteen and one-half (15½) cents per hundred pounds, which said rate continued in effect up to and inclusive of the 25th day of August, 1920, from which date the rate has been and is the sum of nineteen and one-half (19½) cents as established by Supplement No. 8 to Oregon-Washington Railroad & Navigation Company's tariff No. 131–B, effective August 26, 1920.

V.

That during all the times from and after the 10th day of May, 1916, the defendant has charged a greater rate for the transportation of sugar in carload lots over the steamship or steamboat line from San Francisco to Portland than was charged by it in connection with the Oregon-Washington Railroad

& Navigation Company over the same route from San Francisco to North Portland, the said haul from San Francisco to Portland being included within the distance and haul from San Francisco to North [6] Portland, and in the same direction; that on all shipments of sugar hereinafter listed, carried by the defendant from San Francisco to Portland via his boat line from and after the 10th day of May, 1916, to and inclusive of the 28th day of December, 1917, the defendant has charged and collected the sum of fifteen (15) cents per hundred pounds in carload lots from San Francisco to Portland, and on all shipments moving after the first day of March, 1920, up to and inclusive of August 25, 1920, the defendant has charged and collected on all such carload shipments of sugar from San Francisco to Portland the sum of nineteen (19) cents per hundred pounds, and on all shipments moving subsequent to the said 25th day of August, 1920, the defendant has charged twenty-four (24) cents per hundred pounds.

VI.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco, to Portland, Oregon, via the line of the defendant, consigned to Wadhams & Kerr Brothers, the number of carloads on the date and of the weight shown on Exhibit "A" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as

transportation charge fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Wadams & Kerr Brothers, the number of carloads on the date and of the weight shown in Exhibit "B" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Wadhams & Kerr Brothers, the number of carloads on the date and of the [7] weight shown in Exhibit "C" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Kerr Brothers; that the said Wadhams & Kerr Brothers have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

VII.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from

San Francisco to Portland, Oregon, via the line of the defendant, consigned to Mason, Ehrman & Company the number of carloads of sugar on the date and of the weight shown in Exhibit "D" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Mason, Ehrman & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "E" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of the defendant, consigned to Mason Ehrman & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "F" hereto attached and made a part of this paragraph, [8] on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Mason Ehrman & Company; that said Mason Ehrman & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its

right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

VIII.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "G" hereto attached, and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, via the line of defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "H" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of the defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "I" hereto attached and made a part of this paragraph, on all of which defendant received [9] and collected as transportation charge the sum of

twenty-four (24) cents per hundred pounds; that all of said charges in this paragraph enumerated on the shipments listed were paid by Wadhams & Company; that said Wadhams & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

IX.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Co., the number of carloads of sugar on the date and of the weight shown in Exhibit "J" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "K" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from

San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Company, the number of carloads of sugar on the date and of [10] the weight shown in Exhibit "L" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by T. W. Jenkins & Company; that said T. W. Jenkins & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

X.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco, to Portland, Oregon, via the line of the defendant, consigned to Olds, Wortman & King Company the number of carloads of sugar on the date and of the weight shown in Exhibit "M" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, con-

signed to Olds, Wortman & King Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "N" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Olds, Wortman & King Company; that said Olds, Wortman & King Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and [11] claim against the defendant on all shipments shipped between the dates above specified.

XI.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company the number of carloads of sugar on the date and of the weight shown in Exhibit "O" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company, the number of

carloads of sugar on the date and of the weight shown in Exhibit "P" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company the number of carloads of sugar on the date and of the weight shown in Exhibit "Q" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Pacific Coast Biscuit Company; that said Pacific Coast Biscuit Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified. [12]

XII.

That on the 22d day of July, 1916, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis, one carload of sugar weighing 101,688 pounds, on which defendant received and collected as transportation charge the sum of fifteen (15)

cents per hundred pounds, on which said defendant collected and received over and above the legal charge the sum of twenty-five and 42/100 dollars ($25.42); that said shipment was made on waybill No. 91, the consignor being Allen & Lewis, and was shipped by the "Beaver," voyage No. 144; that said charges were made by Allen & Lewis, and that said Allen & Lewis have heretofore for a valuable consideration, sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant therefor.

XIII.

That Astoria is on the route of said steamship company between San Francisco and Portland, and between San Francisco and North Portland, and the rates on sugar, carload lots, from San Francisco to Astoria are the same as from San Francisco to Portland; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Astoria via the line of the defendant, consigned to Ross Higgins, Mason, Ehrman Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "R" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Fran-

cisco to Astoria, Oregon, via the line of the defendant, consigned to Ross Higgins, Mason, Ehrman Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "S" hereto atached and made [13] a part of this paragraph, on all of which defendant charged and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Ross Higgins, Mason Ehrman Company; that said Ross Higgins, Mason Ehrman Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

XIV.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Astoria, Oregon, via the line of the defendant, consigned to Lang & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "T" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the defendant, consigned to Lang & Company, the

number of carloads of sugar on the date and of the weight shown in Exhibit "U" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to the 26th day of August, 1920, there was shipped from San Francisco to Astoria, Oregon, via line of the defendant, consigned to Lang & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "V" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four [14] (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Lang & Company; that said Lang & Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

XV.

That all of the said charges were paid by the respective consignees in the exhibits attached hereto on the date under the column heading "Date Paid," and that the overcharges on each and all of said shipments are designated in the column headed "Overcharges"; that all of said overcharges were illegally exacted and exacted contrary to the pro-

visions of section 4 of the act of Congress known as the Act to Regulate Commerce, and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments, and the defendant is indebted to the plaintiff in the full sum of said overcharges, to wit, the sum of seven thousand eight hundred sixty and 55/100 ($7,860.55), together with interest at the rate of six per cent per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest.

XVI.

That the sum of $2,000.00 is a reasonable sum to be allowed the plaintiff as attorney's fees in this action.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of seven thousand eight hundred sixty and 55/100 dollars ($7,860.55), together with interest on the respective overcharges from the date of payment thereof [15] and for the further sum of two thousand dollars ($2,000.00) as attorney's or counsel's fees, and for costs and disbursements incurred herein.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, A. J. Parrington, being first duly sworn, on

my oath depose and say that I am the plaintiff above named, that I have read the foregoing complaint, know the facts therein stated, and that the same are true as I verily believe.

A. J. PARRINGTON.

Subscribed and sworn to before me this 12th day of February, 1921.

[Seal] JAMES G. WILSON,
Notary Public for Oregon.

My commission expires September 26th, 1924. [16]

AND AFTERWARDS, to wit, on the 8th day of March, 1921, there was duly filed in said court a demurrer to the complaint, in words and figures as follows, to wit: [40]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

Demurrer to Complaint.

Comes now the above-named defendant and demurs to the complaint on file herein on the following grounds:

I.

This court has no jurisdiction of the subject matter of the action.

II.

The complaint does not state facts sufficient to constitute a cause of action.

III.

That action on those claims arising prior to January 1, 1918, has not been commenced within the time limited by the Interstate Commerce Act, nor within the time limited by the 1920 Oregon laws.

In presenting the first ground of demurrer defendant will rely upon the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of actions of this character.

In presenting the second ground of demurrer this defendant will rely upon the proposition that the long and short haul clause of the Interstate Commerce Act has no application to transportation wholly by water.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JOHN F. REILLY.

Service by copy is admitted at Portland, Oregon, March 8, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed March 8, 1921. G. H. March, Clerk. [41]

AND AFTERWARDS, to wit, on the 4th day of April, 1921, there was duly filed in said court an opinion of the court on the demurrer to complaint, in words and figures as follows, to wit: [42]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

L.—8723.

THE PORTLAND SEED COMPANY, a Corporation,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Company),

Defendants.

Memorandum Opinion.

Portland, Oregon, April 4, 1921.

MEMORANDUM by BEAN, District Judge:

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland, and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points. [43]

The third case is a similar action against the Di-

rector General of Railroads, covering a shipment of alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportation to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the Court is without jurisdiction of the subject matter because exclusive original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for

a violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of like kind of property for a shorter than a longer distance over the same line or [44] route, in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeals in S. P. vs. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: One where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction. (Texas & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. vs. U. S., 215 U. S. 481; Robinson vs. B. & O., 222 U. S. 506; Mitchell Coal vs. Penn. R. R., 230 U. S. 247; Morrisdale Coal vs. Penn. R. R., 230 U. S. 304; Tex. & Pac. vs. American Tie Co., 234 U. S. 138; N. P. vs. Solum, 247 U. S. 477). The other where the act complained of is directly prohibited by statute. In such the injured party may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. vs. International Coal, 230

U. S. 184; Penn. R. R. vs. Puritan Coal, 237 U. S. 121; Penn. R. R. vs. Somner, 242 U. S. 120.)

As the long and short haul clause of the Interstate Commerce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured party may in my judgment sue without first applying to the Commission for relief.

(2) The shipments involved in two of the cases were [45] by water from San Francisco to Portland, and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which

case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension, the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.-W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions. [46]

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damage shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the Court in Phillips vs. Grand Trunk (236 U. S. 662) which lends

support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. f, 41 Stat. at L. 462) declared that "the period of federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin, in Wenatchee Produce Co. vs. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except in so far as may be inconsistent with the provisions [47] of the act or any other act applicable to federal control or with any order of the President.

It would seem, therefore, that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission

pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv. a, of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of

proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control. [48]

As the present actions could have been maintained in this court against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208–a of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates involved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

Filed April 4, 1921. G. H. Marsh, Clerk. [49]

AND AFTERWARDS, to wit, on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the regular March term of said court—Present, the Honorable ROBERTS. S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [50]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Minutes of Court—April 4, 1921—Order Overruling Demurrer.

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the Court being fully advised in the premises, it is ORDERED that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer.

Done and dated in open court this 4th day of April, 1921. [51]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation amending complaint, in words and figures as follows, to wit: [52]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

Stipulation Amending Complaint.

It is hereby stipulated by and between the parties hereto by their respective attorneys as follows:

I.

That paragraph VI of the plaintiff's complaint may be amended by adding to line 3 on page 5 of the complaint after the words "Exhibit 'C' hereto attached," the words "and supplementary Exhibit 'C' attached to the stipulation amending the complaint."

II.

That paragraph VII of the complaint be amended by adding to the last line on page 5 of the complaint after the words "Exhibit 'F' hereto attached," the words "and supplementary Exhibit 'F' attached to the stipulation amending the complaint."

III.

That paragraph VIII of the complaint be amended by adding after the words "Exhibit 'I' hereto attached" in line 27 on page 6, the words,

"and supplementary exhibit 'I' attached to the stipulation amending the complaint."

IV.

That paragraph XI of said complaint be amended by adding thereto after the words "Exhibit 'L' attached hereto," in line 25 on page 7, the words "and supplementary exhibit 'L' attached to the stipulation amending the complaint."

V.

That paragraph XII of said complaint be amended by adding thereto at the end of said paragraph the following words: [53] "That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis the number of carloads of sugar on the dates and of the weights shown in the exhibit headed 'Supplementary Exhibit to paragraph XII of complaint' attached to the stipulation amending complaint and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of 15 cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis, the number of carloads of sugar on the dates and of the weights shown in the exhibit attached to the stipulation amending the complaint and headed 'Supplementary Exhibit, Allen & Lewis' and made a part of this paragraph, on all of which defendant received and collected as transportation

charge the sum of 19 cents per hundred pounds; that all of these charges above in this paragraph enumerated on shipments listed were paid by Allen & Lewis; that said Allen & Lewis have heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to the said overcharge and claim against defendant on all shipments shipped between the dates above specified."

VI.

That paragraph XIV of said complaint be amended by substituting the words "Portland, Oregon," in each place where "Astoria, Oregon." is used, and that said paragraph be amended by adding after the words "in Exhibit 'V' hereto attached," in line 19 of page 11 of said complaint, the words "and supplimentary Exhibit 'V' attached to the stipulation amending complaint." [54]

It is further stipulated that the answer of the defendant as filed may appear as the answer to the complaint as herein amended.

JAMES G. WILSON,
Attorney for Plaintiff.
JOHN F. REILLY,
Of Attorney for Defendant. [55]

AND AFTERWARDS, to wit, on the 23d day of April, 1921, there was duly filed in said court an answer, in words and figures as follows, to wit: [63]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Answer.

Comes now the above-named defendant and for answer to the complaint on file herein, admits, denies, and alleges as follows:

I.

Admits all of the allegations contained in paragraph I.

II.

Denies each and every allegation contained in paragraph II, except that he admits Oregon-Washington Railroad & Navigation Company filed an application with the Interstate Commerce Commission for permission to continue the ownership and control of a part of the stock of said San Francisco & Portland Steamship Company, and to continue operation of the steamships of said company between San Francisco and Portland, and that its application was granted.

III.

Denies all the allegations contained in paragraph III, except that it admits that Oregon-Washington

Railroad & Navigation Company is a railroad corporation and a common carrier between Portland and North Portland.

IV.

Admits all of the allegations contained in paragraph IV, except that it denies that it was in control of said line of steamships between October 12, 1917, and March 1, 1920, and denies that during said period it maintained said or any rates. [64]

V.

Denies each and every allegation contained in paragraph V, except that it admits that from May 10, 1916, to October 12, 1917, and from March 1, 1920, up to the date of filing of the complaint, defendant's tariffs called for the differences in rates on sugar between San Francisco and Portland and San Francisco and North Portland stated in said paragraph.

VI.

Denies each and every allegation contained in paragraphs VI, VII, VIII, IX, X, XI, XII, XIII, XV, and XVI, except that defendant admits that the shipments mentioned were made and charges collected by defendant thereon on the bases stated and that Astoria is on the route of defendant between San Francisco and Portland.

And for a further, separate, and affirmative answer and defense to plaintiff's complaint, defendant alleges:

I.

That the shipment shown on Plaintiff's Exhibits "A," "B," "G," "J," "M," "O," and "T" were all

delivered and the charges thereon paid more than four years prior to the filing of the complaint herein.

And for a second further, separate, and affirmative answer and defense, defendant alleges:

I.

That the rates on sugar from San Francisco to Portland collected by defendant between February 29, 1920, and August 26, 1920, were the same rates as those shown in the tariff of United States Railroad Administration, San Francisco & Portland Steamship Company as applicable to the transportation of sugar between said points on February 29, 1920, and thereafter up to the end of Federal control of railroads, and that pursuant to an order of the Interstate Commerce Commission said rates were [65] increased August 26, 1920.

WHEREFORE, having fully answered plaintiff's complaint herein, prays that said complaint may be dismissed and that defendant have and recover its costs and disbursements incurred herein.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, C. E. Cochran, being first duly sworn, depose and say: That I am Secretary of San Francisco and Portland Steamship Company, the corporation defendant within named; that I have read the foregoing answer, know the contents thereof, and that the same is true as I verily believe.

C. E. COCHRAN.

Subscribed and sworn to before me this 23d day of April, 1921.

[Seal] JOHN F. REILLY,
Notary Public for Oregon.

My commission expires June 16, 1922.

Service by copy admitted at Portland, Oregon, April 23, 1921.

GEORGE B. GUTHRIE,
Of Solicitors for Plaintiff.

Filed April 23, 1921. G. H. Marsh, Clerk. [66]

AND AFTERWARDS, to wit, on the 26th day of April, 1921, there was duly filed in said court a demurrer to answer, in words and figures as follows, to wit: [67]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Demurrer.

Comes now the plaintiff in the above-entitled action and demurs to the first further, separate, and affirmative answer and defense to plaintiff's com-

plaint set out in the last four lines on page 2 of defendant's answer on the ground and for the reason that the facts stated therein do not constitute a defense to the plaintiff's complaint as referring to the shipments shown on Exhibit "A," "B," "G," "M," "O," and "T."

Plaintiff demurs to the second further, separate, and affirmative answer and defense set out on page 3 of defendant's answer on the ground and for the reason that the facts therein stated are insufficient to constitute a defense to plaintiff's complaint.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

POINTS RELIED UPON.

On the argument of said motion the plaintiff will rely upon the fact:

1.

That the period of limitation on the class of claims set forth in plaintiff's complaint is six years and is governed by section 6 of Oregon Laws of 1920 and not by the four-year limitation. [68]

2.

That the Court has passed upon the contention made by the second affirmative defense contrary to defendant's contention that the fact that rates were continued after the Railroad Administration when not legally established did not constitute said rates lawful rates of the defendant.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

I, James G. Wilson, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JAMES G. WILSON,
Of Attorneys for Plaintiff.

Service of copy admitted at Portland, Oregon, April 25, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed April 26, 1921. G. H. Marsh, Clerk. [69]

AND AFTERWARDS, to wit, on the 27th day of June, 1921, there was duly filed in said court an opinion of the Court on the demurrer to the answer, in words and figures as follows, to wit: [70]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

June 27, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Memorandum Opinion.

MEMO.

WILSON & GUTHRIE, for Plaintiff.

A. C. SPENCER and JOHN F. REILLY, for Defendant.

WOLVERTON, District Judge:

By its first further and separate answer, defendant pleads the statute of limitations as applying to any liability arising respecting certain enumerated exhibits; and by its second separate answer, it is shown, in effect, that the rates on sugar collected between February 29, 1920, and August 26, 1920, were the same as those shown in the tariff of the United States Railroad Administration applicable to the transportation of sugar on February 29, 1920, and thereafter up to the end of Federal control of railroads.

The sufficiency of each of these answers is challenged by demurrer.

It is agreed, that as to the statute of limitations, one or two provisions of the Oregon statute applies, depending on whether the action is upon a liability created by statute, which may be commenced within six years (sub. 2, § 6, Olson's Oregon Laws), or is one for an injury to a person or rights of another not arising on contract, which must be brought within two years (sub. 1, § 8, id.). This relates to

an action for tort. The instant action is to [71] recover an overcharge on rates of transportation.

Section 406 of the Transportation Act (41 Stat. 480) inhibits the act of charging more for a short haul than for a long haul, and section 8 of the Interstate Commerce Act (4 Fed. Stat. Ann. 430) renders the carrier liable to the person injured by such an act for the damages sustained. It is obvious, therefore, that the liability is one created by statute rather than one arising from tort.

The second separate answer is, in effect, a declaration that the rates collected between February 29, 1920, and August 6, 1920, were the same as those authorized under the Railroad Administration, and that they were legalized by the Transportation Act. The defendant having denied a violation of the Interstate Commerce Act in what it did, this answer presents an issue as to which were the legal rates. This issue can be determined on the final hearing, and will be so relegated.

The demurrer, therefore, will be sustained as to the first separate answer, and overruled as to the second.

Filed June 27, 1921. G. H. Marsh, Clerk. [72]

AND AFTERWARDS, to wit, on Monday, the 27th day of June, 1921, the same being the 97th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [73]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

June 27, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

Minutes of Court—June 27, 1921—Order Sustaining and Overruling Demurrer in Part.

This cause was heard by the Court upon the demurrer to the answer herein, plaintiff appearing by Mr. James G. Wilson, of counsel, and defendant by Mr. John F. Reilly, of counsel. Upon consideration whereof it is ORDERED that said demurrer be and the same is hereby sustained as to the first separate answer of the defendant and overruled as to the second separate answer of defendant herein. [74]

AND AFTERWARDS, to wit, on the 29th day of June, 1921, there was duly filed in said court, a reply, in words and figures as follows, to wit: [75]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

Reply.

Comes now the plaintiff and for reply to the second further separate and affirmative answer and defense set forth in defendant's answer, denies each and every allegation and the whole thereof except that this plaintiff admits that the purported schedule of rates on file at the termination of federal control purported to name on transportation of sugar from San Francisco to Portland the rates which were charged the plaintiff's assignors on shipments subsequent to February 29, 1920, and that thereafter and on August 26, 1920, the Interstate Commerce Commission passed an order increasing all rates in effect, but plaintiff denies that said purported rates on sugar so stated in said

schedule were in fact legally established, but alleges that said rates so charged were not in fact in effect and were not in fact increased to the extent asserted by said order of August 26, 1920, but that the legally established rates were the rates as alleged in plaintiff's complaint.

WHEREFORE, having fully replied, plaintiff prays judgment against defendant as prayed for in his original complaint.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, A. J. Parrington, being first duly sworn, on my oath depose and say that I am plaintiff as above named, that I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

A. J. PARRINGTON. [76]

Subscribed and sworn to before me this 27th day of June, 1921.

[Seal] RUTH SMALL,
Notary Public for Oregon.

My commission expires April 11, 1924.

Service by copy admitted at Portland, Oregon, June, 1921.

JOHN F. REILLY,
Attorney for Defendant.

Filed June 29, 1921. G. H. Marsh, Clerk. [77]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation waiving jury trial, in words and figures as follows, to wit: [78]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY,

Defendant.

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties hereto by their respective attorneys that a jury be and is hereby waived in the trial of the above-entitled cause and that the said cause be tried before the Court without a jury.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
C. E. COCHRAN,
Of Attorneys for Defendant.

Filed July 20, 1921. G. H. Marsh, Clerk. [79]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of July, 1921, the same being the 15th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [80]

In the District Court of the United States for the District of Oregon.

L.—8748.

July 20, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY,

Defendant.

Minutes of Court—July 20, 1921—Trial.

Now at this day come the plaintiff by Mr. James G. Wilson, of counsel, and the defendant by Mr. C. E. Cochran, of counsel, whereupon upon motion of said parties by their respective counsel, it is ordered that this cause be and it is hereby consolidated for the purpose of trial with cause #L.—8748, entitled A. J. Parrington vs. James C. Davis.

Whereupon, this being the day set for the trial of this cause, the parties having filed a written

stipulation waiving jury trial herein, said cause comes on for trial before the Court. And the Court having heard the evidence adduced and the arguments of counsel, it is ordered and adjudged that special findings and judgment be prepared in favor of plaintiff and against defendant herein. [81]

AND AFTERWARDS, to wit, on the 5th day of August, 1921, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [82]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the evidence having been submitted by

both parties, the Court being fully advised, does now make and find from the issues presented by the pleading and the evidence offered the following

FINDINGS OF FACT.

I.

That the Oregon-Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as Amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control and to continue the operation of the line of steamships and steamboats of the said San Francisco and Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad [83] & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company and that said line was being operated in the interest of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that said Oregon-Washington Railroad Navigation Company might continue the operation

of said line and the ownership of said stock subsequent to July 1, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco and Portland Steamship Company to file with the Commission all of its tariffs, rules, and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco and Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation Company its rates between San Francisco and North Portland on sugar; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the said San Francisco and Portland Steamship Company.

II.

That in and by the schedule of tariffs filed by the defendant in connection with the Oregon-Washington Railroad & Navigation Company said defendant established and put into effect a rate on sugar in carload lots of 30,000 pounds minimum from San Francisco to North Portland, which said rate so published, filed, and put in effect was twelve and one-half (12½) cents per hundred pounds at all times between February 17, 1916, to and inclusive of the 28th day of December, 1917, and was fifteen and one-half (15½) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the [84] 25th day of August, 1920, and

was nineteen and one-half (19½) cents per hundred pounds from and inclusive of August 26, 1920, until April 30, 1921; that the defendant carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments originating between the 17th day of February, 1916, and the 28th day of December, 1917, charged and collected therefor for its transportation charges at the rate of fifteen (15) cents per hundred pounds; on all shipments originating between the first day of March, 1920, and the 25th day of August, 1920, charged and collected the sum of nineteen (19) cents per hundred pounds; and that on all shipments shown in said exhibits from and after the 26th day of August, 1920, the sum of twenty-four (24) cents per hundred pounds was charged and collected; and in addition to such charges, collected and received on all of such shipments war tax at the rate of 3% of the freight charged.

III.

That all of said charges at said rates were paid by the plaintiff's assignors to the defendant, that the amount of the excess charges so collected by the defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above

what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, was and is the sum of two thousand six hundred [85] forty-eight and 64/100 dollars ($2,648.64), and the amount of such excess charges so collected by the defendant from and including the first day of March, 1920, to and including the 25th day of August, 1920, was and is the sum of two thousand six hundred eighty and 7/100 dollars ($2,-680.07), and the amount of such excess charges so collected on the shipments included in the complaint and in the stipulation amending the complaint subsequent to the 25th day of August, 1920, was and is the sum of six thousand fifty-one and 98/100 dollars ($6,051.98).

IV.

That Portland and Astoria, Oregon, are intermediate between San Francisco and North Portland on the route established by the San Francisco and Portland Steamship Company in connection with the Oregon-Washington Railroad & Navigation Company for shipments of sugar between San Francisco and North Portland, and the defendant charged and collected on all of the shipments to Portland and Astoria a greater sum than its rates established by it in connection with the Oregon-Washington Railroad & Navigation Company on shipments of sugar from San Francisco to North Portland, Oregon, said shipments moving over the same route in the same direction, and the haul from San Francisco to Portland and Astoria being included within the haul over the route so established

from San Francisco to North Portland, said excess being the amounts shown in the preceding paragraph.

V.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco and Portland Steamship Company that it would at noon on October 15, 1917, [86] requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco and Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," and that thereafter formal charters were executed on as of October 15, 1917, covering the steamships Beaver and Rose City, owned by the San Francisco and Portland Steamship Company; that on May 24, 1918, the United States Shipping Board notified the San Francisco and Portland Steamship Company as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships Beaver and Rose City, and that on and after May 29 the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VI.

That defendant during all of the time from October 15, 1917, to and inclusive of noon on the 28th

day of December, 1917, continued to issue its bills of lading on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, and collected from the plaintiff's assignors the charges for the transportation of such shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission, but continued to accept shipments and assess charges under said tariffs as so filed.

VII.

That the shippers who shipped said sugar over the [87] line of the defendant as listed on the exhibits attached to the plaintiff's complaint and the stipulation amending the complaint, have each and all assigned their claims for the overcharge assessed by the defendant against said shippers to the plaintiff herein, and he is the lawful owner and holder thereof.

VIII.

That the sum of two thousand dollars ($2,000.00) is a reasonable sum to be allowed the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fees to cover only the work with reference to said collection in this court and not on any appeal therefrom.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

1.

That the charges assessed against the plaintiff's assignors for the transportation of sugar in carload lots from San Francisco to Portland and to Astoria

was illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the defendant having issued its bills of lading and collected the freight charges on shipments between October 15, 1917, and December 28, 1917, was liable to the shippers on [88] such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the defendant.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of eleven thousand three hundred eighty and 69/100 dollars ($11,380.69), with interest at the rate of six per cent (6%) per annum on the sum of two thousand six hundred forty-eight and 64/100 dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent (6%) per annum on the sum of two thou-

sand six hundred eighty and 7/100 dollar ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent (6%) per annum on the sum of six thousand fifty-one and 98/100 dollars ($6,051.98) from March 1, 1921, and also two thousand dollars ($2,000.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [89]

AND AFTERWARDS, to wit, on Thursday, the 5th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [90]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Minutes of Court—August 5, 1921—Judgment.

This matter coming on, on application of plaintiff, for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorneys, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises:

It is hereby ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant San Francisco and Portland Steamship Company, a corporation, judgment in the sum of eleven thousand three hundred eighty and 69/100 dollars ($11,380.69), together with interest at the rate of six per cent per annum on the sum of two thousand six hundred forty-eight and 64/100 dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent per annum on the sum of two thousand six hundred eighty and 7/100 dollars ($2,680.07) from the 25th day of Au-

gust, 1920, and interest at the rate of six per cent per annum on the sum of six thousand fifty-one and 98/100 dollars ($6,051.98) from March 1, 1921, and also two thousand dollars ($2000.00) as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of ——— and that execution issue therefor.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [91]

AND AFTERWARDS, to wit, on the 21st day of September, 1921, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [92]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,
Plaintiff,

vs.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 20th day of July, 1921, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E. Cochran, respectively the attorneys, and jury by a stipulation in writing filed in this Court was waived and said case tried to the Court.

WHEREUPON the following proceedings were had:

Mr. Wilson offered documentry evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action.

Mr. WILSON.—I offer in evidence the Proclamation of the President of the United States as contained in 40 Statutes at Large, at page 1733, and the following portion of said Proclamation was read:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers [93] thereto me enabling, do hereby through Newton T. Baker, Secretary of War, take possession and assume control, at 12 o'clock noon, on December 28, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the Continental

United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private carlines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon, or operated as a part of such rail or combined rail and water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that, so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interests may require, and of the usual and ordinary business and duties of common carriers."

Mr. WILSON.—I offer in evidence a copy of the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company, under the provisions of Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act in connection with the ownership of the San Francisco and Portland Steamship Company. The opinion is not certified but is reported in 34 I. C. C. 165.

Mr. COCHRAN.—We object to the document as immaterial and irrelevant in that its subject matter

has no part in the proof of plaintiff's claim against The San Francisco & Portland Steamship [94] Company, but we do not make a point upon the fact that the document appears to be uncertified and that plaintiff not being a party to the proceedings before the Interstate Commerce Commission is neither bound nor benefitted by that decision.

COURT.—Admitted, subject to objection.

(The document was marked Plaintiff's Exhibit 2 and is physically attached to plaintiff's bill of exceptions and made a part hereof.)

Testimony of A. J. Parrington, on His Own Behalf.

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. WILSON.

My name is A. J. Parrington; residence, Portland, Oregon; business, Traffic Attorney for about twelve years. I have been employed in the Traffic Department in various capacities with different railroads, the last with the Oregon-Washington Railroad & Navigation Company for the past twelve years. My work has consisted almost solely in the preparation and reading of tariffs. I have a map showing the location of the line of The San Francisco and Portland Steamship Company.

(This document was marked Plaintiff's Exhibit 3 for identification.)

The witness marked upon Exhibit 3 the location of Astoria with letter "A," the city of Portland

(Testimony of A. J. Parrington.)

with letter "B," and the location of North Portland with letter "C."

The route of The San Francisco and Portland Steamship Company from San Francisco to Portland is as follows:

Passing through the Golden Gate to the Pacific Ocean, thence to the mouth of Columbia River, thence into this river to Astoria, thence up Columbia River, to Willamette River, thence to Portland, Oregon. North Portland is located about five miles above the junction [95] of the Willamette and Columbia Rivers on what is called Columbia Slough.

Thereupon counsel for plaintiff inquired as follows:

Q. Is it on the route of The San Francisco and Portland Steamship Company?

Mr. COCHRAN.—I object to that as immaterial.

COURT.—Objection overruled.

To which ruling counsel for defendant excepted and its exception was duly allowed. A. It is not.

The witness then testified further that the steamers of The San Francisco and Portland Steamship Company do not stop at North Portland, nor do the tariffs of said Company name rates to North Portland. The San Francisco and Portland Steamship Company during the times referred to in the complaint was party to certain tariffs naming rates from San Francisco to North Portland. They are Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, I. C. C. No. 384, effective

(Testimony of A. J. Parrington.)

February 17, 1916. Item 445 of the tariff which names rates on sugar from San Francisco to North Portland of 12½¢ provides "via route No. 1 as shown on page 34" under the caption of "Routing" shows Route No. 1 via The San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland.

Mr. WILSON.—It is admitted in the pleadings that the Oregon-Washington Railroad & Navigation Company's line of railroad extends from Portland to North Portland.

The witness continued: Item 445 of the tariff naming rates from San Francisco to North Portland of 12½¢ for 100 pounds on sugar, carload lots, minimum weight 30,000 lbs., continued in effect from February 17, 1916, to June 24, 1918. [96] On June 25, 1918, a special supplement No. 14 to the same tariff increased the rates from 12½¢ to 15½¢. That change was authorized by the Director General of Railroads under General Order No. 28 which advanced with few exceptions all rates over the entire United States 25 per cent. The 15½¢ rate continued in effect until the expiration of the tariff July 4, 1919. Thereafter the rates were carried in the Oregon-Washington Railroad & Navigation Lines' Tariff No. 131-B, I. C. C. No. 589, effective July 4, 1919. Item 460 of that tariff continued the rate from San Francisco to North Portland of 15½¢ via Route No. 1 as shown on page 36 of the tariff. Route No. 1 as shown on page 36 of the tariff pro-

(Testimony of A. J. Parrington.)

vides that movement northbound would be via San Francisco and Portland Steamship Line, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. That rate was continued in effect up to and including August 25th, 1920. By Supplement No. 8 to the same tariff, effective August 26, 1920, the rate of 15½c was increased to 19½c. That increase is the result of the Interstate Commerce Commission decision in Ex parte 74,–58 I. C. C. Reports 220. The rates in that tariff were continued to January 15, 1921, and thereafter the same rate was carried in S. J. Henry Tariff No. 2–A, I. C. C. 35, effective January 15th, 1921.

(These tariffs were admitted in evidence and marked Plaintiff's Exhibit 4.)

STIPULATION OF COUNSEL.

It is stipulated and agreed that in making up the final record that material parts of these tariffs, as read by the witness, may be copied at length in the record with the same evidential effect as the original documents.

The witness continued: The rate on sugar from San Francisco to North Portland was [97] increased by Supplement No. 3 to North Pacific Coast Freight Bureau Tariff No. 2 I. C. C. No. 35, by S. L. Henry, Agent, from 19½c to 24c effective April 30th, 1921.

The witness continued: The rates actually charged on the sugar movement from San Francisco, California, to Portland, Oregon, was as follows:

(Testimony of A. J. Parrington.)

From May 1, 1915, to May 10, 1916, 12½¢ per 100 lbs.

From May 10, 1916, to June, 24, 1918, 15¢ per 100 lbs.

From Jne. 25, 1918, to Aug. 25, 1920, 19¢ per 100 lbs.

From Aug. 26, 1920, to Jly. 10, 1921, 24¢ per 100 lbs.

There are no shipments described in the complaint subsequent to the last mentioned date.

The witness continued: At North Portland the Swift Packing Company used sugar in pickling their meats. I understand they are large consumers. The movement of sugar by The San Francisco and Portland Steamship Company to Portland moves from San Francisco to Portland via the same boats over the same route. With respect to shipments of sugar to Astoria, the tariffs provide the same rates as to Portland during the periods covered by the tariffs hereinbefore read. Shipments to Astoria as far as they go move over the same route from San Francisco as those to North Portland.

The witness continued: I have a document which is the original shipping receipt or bill of lading issued by The San Francisco and Portland Steamship Company, dated San Francisco, December 1, 1917, issued by F. O. Schullerts, Agent, The San Francisco and Portland Steamship Company at San Francisco.

(Document offered in evidence marked Plaintiff's Exhibit 5.)

Mr. WILSON.—I have numerous expense bill receipts of The San Francisco and Portland Steamship Company subsequent to October 12, 1917. I

(Testimony of A. J. Parrington.)

offer in evidence expense bill of The San Francisco and Portland Steamship Company showing receipt of payment of transportation [98] charges on sugar issued to Mason, Ehrman & Company, December 5, 1917, being within the period which is involved in these cases.

(Document received in evidence marked Plaintiff's Exhibit 6.)

Mr. WILSON.—I have receipts representing each shipment mentioned in the complaint.

Mr. COCHRAN.—I will agree that receipts upon forms similar to Plaintiff's Exhibit 6 were issued in respect to each shipment mentioned in the complaint against The San Francisco and Portland Steamship Company. I will also agree that Plaintiff's Exhibit 6 in substance and effect may be considered as the type of those receipts without the necessity of producing the original, but I deny the legal effect claimed by counsel, and will contend that The San Francisco and Portland Steamship Company since October 12th, 1917, to May 29th, 1918, was acting solely as agent for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation pursuant to requisitions by Mr. Bainbridge Colby, Commissioner, and charter parties subsequently entered into, effective October 12th, 1917, which documents will be subsequently offered in evidence.

Q. (By Mr. WILSON.) Mr. Parrington, do you keep a file of all tariffs with reference to shipments in this locality?

(Testimony of A. J. Parrington.)

A. I have practically a complete set of tariffs covering this territory.

Q. Did you ever receive any notice, or do your tariffs show that any cancellation of the tariffs of The San Francisco and Portland Steamship Company on October 12, 1917, or any subsequent date, was made? Between that and May, 1918?

A. The San Francisco and Portland Steamship Company's northbound freight tariff No. 4 I. C. C. No. 10, was in effect at the time—at all times between August 4, 1914, and February 20, 1920.

Q. No cancellation? [99]

A. The tariff was supplemented during that time, but at no time does the Emergency Fleet Corporation, or the United States Shipping Board appear as a party to the tariff. Now does The San Francisco and Portland Steamship Company appear as agent for the United States Shipping Board Emergency Fleet Corporation.

Q. Now, Mr. Parrington, I will ask you whether or not in any of these tariffs which you have referred to as naming rates to Portland, there is contained on the title page a reference to any order of the Commission authorizing The San Francisco and Portland Steamship Company to charge more for the carriage of sugar to Portland than it participated in rates on the same commodity to North Portland?

A. It does not.

Q. Have you with you Tariff Circular 18–A of the Interstate Commerce Commission? A. I have.

Mr. WILSON—I would like to offer in evidence and

(Testimony of A. J. Parrington.)

read in evidence the requirements of the Interstate Commerce Commission with reference to showing on tariffs any authority for violation of the long and short haul clause. It is a part of Rule 77 of Tariff Circular 18–A of the rulings of the Interstate Commerce Commission, and reads as follows:

"When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distance over the same line or route, the title page of each tariff issued and filed under such authority must bear the following notations: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate [100] Commerce Order FS. No. —— of (date) 19 ——.' When the Commission has issued an order granting a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of the intermediate rate, or fares subject to the rate, title page of each tariff issued and filed under such authority, must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the interstate rates (or fares) subject to the Act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission

(Testimony of A. J. Parrington.)

Order FS. No. —— of (date) 19 ——.' Nothing in this rule may be considered as waiving any provisions of the amended fourth section of the Act to Regulate Commerce."

Cross-examination.

(Questions by Mr. COCHRAN.)

Q. Here is a document which has been marked for identification, Defendant's Exhibit "A," having the purport of being the map of Portland Harbor. I will ask you to examine the document and say if you agree with me that it is such map, and fairly and correctly represents the location of Portland Harbor—indeed, that the map is what it purports to be.

A. It is.

(The document was offered in evidence, received and marked defendant's Exhibit "A" and is attached to this bill of exceptions and made a part hereof.)

The witness continued: The scale on the map has graduated up to 4,000 feet.

STIPULATION OF COUNSEL.

It is agreed between counsel that on Defendant's Exhibit "A" the scale of the map is 2¼ inches equals 4,000 feet. [101]

The witness in respect to Defendant's Exhibit "A" further testified:

The portion of the map marked "Columbia River," and the junction of Columbia River with another river marked "Willamette River" represents the junction of these two rivers, and is the place where a steamship carrying cargo from San Francisco, via Columbia River, to Portland would depart from the

(Testimony of A. J. Parrington.)

Columbia River to enter the Willamette River. The portion marked "North Portland Harbor" is the place which I referred to in my direct examination as "Columbia Slough." North Portland is located on Defendant's Exhibit "A" as approximately 12 inches from the junction of the river, and what is shown as North Portland Harbor, and I will mark North Portland with the letter "C" which is the same description used upon Plaintiff's Exhibit 3. The lines shown upon Defendant's Exhibit "A" as "City Boundary" represents the corporate limits of the City of Portland. There is a line of railroad extending from North Portland, owned by the Oregon-Washington Railroad and Navigation Company, to a junction which is marked with the letter "J" upon Exhibit "A," and then extends over to the Willamette River in a rather westerly direction to a place called Municipal Terminal No. 4. There is also a line of railroad extending from North Portland from point "C" on Defendant's Exhibit "A" over the same route to the junction which has been marked "J," and there goes straight on south into the City of Portland up to the yards and through the terminal—to Albina Yards, which is shown on the exhibits as "O.-W. R. & N. Co. Albina Yards," and to various terminals, docks and warehouses as shown upon the map. The berth of the steamships of The San Francisco and Portland Steamship Company in Portland is Ainsworth Dock, located on the west side of the Willamette River between the Broadway and Steel Bridges. It is connected with tracts of the Northern

(Testimony of A. J. Parrington.)

Pacific Terminal Company. Transfer from ship to rail is usually at Ainsworth Dock. [102] I know where the transfers were made at Ainsworth Dock, but we don't claim transfer of this sugar.

Q. (By COCHRAN.) Do you know, as a matter of fact, that the Steamship Company unloads at any of these docks along the river from Municipal Terminal No. 4 clear up to the other Municipal Terminals on this Exhibit "A," don't you?

A. The tariffs of the company provide that the steamships will stop at one or more flour mills for cargo of a certain amount. They will not stop at miscellaneous docks for small cargo, either to take on or discharge cargo, a few carloads. They specify the number of tons for which they will call at a dock, and I believe it is in the neighborhood of 400 tons.

Q. Here is a ruler. Will you tell us the distance from the water connection with rail at Municipal Terminal No. 4 up to the Ainsworth Dock, which is marked on this Exhibit "A" as No. 57?

A. It is approximately 22 inches.

Q. Twenty-two inches upon the map. The other is approximately 12 inches?

A. Twelve inches.

Q. Now, tell us the difference from Municipal Terminal No. 4 by rail to North Portland?

A. That is a varying line and you can measure only straight; can only get an approximate distance, approximately 11 inches upon the map.

Q. Now, the distance upon the ground would be those inches multiplied by 4,000 feet?

(Testimony of A. J. Parrington.)

A. It would.

Redirect Examination by Mr. WILSON.

Q. At the various docks here in the City of Portland, to which [103] reference has been made, that the company will stop for cargo of a certain amount, which you say you think is 400 tons, does the Portland rate apply at all these docks wherever they land?

A. It does.

Q. Is there any place between the mouth of the Columbia River and the Ainsworth Dock, the regular berth of these steamers, where the rate is shown by the tariff as anything less than the Portland rate?

A. No.

Recross-examination by Mr. COCHRAN.

Swift & Company, at North Portland, do not buy sugar for the purpose of selling it to the trade. They merely use it in the pickling and preserving of their meats. There is no business at North Portland of the type of my assignors, such as Allen & Lewis, Mason, Ehrman & Company, and the Pacific Coast Biscuit Company, but the rate is there for their use if they choose to distribute from there.

Redirect Examination by Mr. WILSON.

The tariff makes no distinction between sugar for curing ham and sugar for preserving bought here in Portland. Sugar is sugar under the tariff, and it all moves under that rate, whether it is of the character they use in curing hams or the character they use for the table.

COURT.—Is North Portland Harbor, as marked

(Testimony of A. J. Parrington.)

on that map, Plaintiff's Exhibit "A," navigable for boats the size of those operated by the Steamship Company as far as North Portland?

A. I could not answer that question.

Mr. WILSON.—I think the lumber schooners go in there for the Monarch Mills.

A. I believe. I have no knowledge. [104]

Mr. COCHRAN.—Our steamers, I understand, have put in there at North Portland.

COURT.—Your steamers have? A. Yes.

COURT.—Regularly? All steamers north?

Mr. COCHRAN.—I don't think regularly, your Honor. I think probably only during high water. Mr. Mount, our Assistant General Freight Agent, tells me there is ample water for all boats drawing up to 16 feet, I think, to go up there, but our general course, however, is Willamette and Columbia Rivers, not into these sloughs.

Testimony of James G. Wilson, for Plaintiff.

JAMES G. WILSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows, without interrogation.

Mr. COCHRAN.—I will admit counsel is an attorney of this Court, and has had many years of experience in commerce procedure and trial of cases, and is familiar with cases of this kind.

Mr. WILSON.—I have been attorney for Plaintiff since the inception of this case. There are involved in this case a great many overcharges on separate bills. I assume there will be approximately—the

(Testimony of James G. Wilson.)

overcharges will average, perhaps $18. to $20. on each shipment. It involves the examination and preparation of a great many expense bills, bills of lading and considerable time in the preparation of the case. In addition to that, there has been involved argument on demurrer. For the preparation of that, the time involved was, I should say, ten days or two weeks. Briefs were filed, and a considerable amount of work involved with them. There is involved in this case approximately $7500.00 of overcharges, and *and* I think $1500.00 is a reasonable attorney's fee for the court to assess.

Testimony of A. J. Parrington, on His Own Behalf (Recalled).

A. J. PARRINGTON, plaintiff, recalled as a witness on his own behalf, testified as follows: [105]

Direct Examination.

While on the stand previously I spoke about the tariffs of The San Francisco and Portland Steamship Company providing for stopping at other wharves in the City of Portland for delivery or reception of traffic of a certain amount. I have the tariffs with me. As showing the practice of the San Francisco and Portland Steamship Company relative to picking up freight or delivering freight at outside docks other than their regular place of landing. I read from The San Francisco and Portland Steamship Company's South-Bound Local Freight Tariff No. 5, I. C. C. No. 11, under the title of "Absorption," Paragraph A:

(Testimony of A. J. Parrington.)

"When shipments of barley, flaxseed, oats, rye, wheat, or mill feed in lots of 200 tons or over are accepted, the Company may at its option, send its steamers to outside docks at Portland to receive such grain or mill feed, in which event, no charge in addition to the freight rate as shown herein will be made."

Paragraph D under the same caption reads as follows:

"On freight in carload lots, originating at points outside of Portland or Astoria, Oregon, delivered at this Company's regular place of landing in Portland or Astoria, and shipped under regular bill of lading from Portland or Astoria to San Francisco, the cost of unloading such freight from cars and charging for switching such cars from railroad to such landing at Portland or Astoria, will be assumed by this company when the tariffs providing for the absorption of such is legally on file at the Interstate Commerce Commission."

There is no provision for picking up or delivering freight at docks or landing places other than the regular landing place in the Northbound Tariff.

Cross-examination by Mr. COCHRAN.

Q. Will you refer to the tariff, northbound tariff, San Francisco [106] and Portland Steamship Company No. 4, I. C. C. No. 10, and see whether or not there is anything in that tariff which indicates

(Testimony of A. J. Parrington.)

the rates solely to the regular landing place or berth of the steamers.

A. By inference only. There is no mention of the regular landing place, but it does mention dock. By "dock" you would infer the regular dock.

Q. That is your inference. Where does it mention dock?

A. Well, in the second paragraph on third revision, page 3, under the caption of "Absorption."

Q. That is southbound tariff?

A. No, this is northbound tariff, the one you just referred to.

Q. Now, you have referred to a paragraph entitled "Absorption" on page 3, of the Northbound local freight tariff of the San Francisco and Portland Steamship Company.

A. Yes, third page. No. 3.

Q. Which reads as follows: "On freight in carload lots"—

A. Just a moment. The second paragraph I referred to.

Q. I am reading the first: "On freight in carload lots originating at points outside of San Francisco, delivered in cars at this company's regular landing place in San Francisco, and shipped under local bill of lading from San Francisco to Astoria and Portland, Oregon, the switching charges in San Francisco assessed by the California State Belt Railroad and the expense of car unloading, will be assumed

(Testimony of A. J. Parrington.)

by this company." Now, you observe nothing there that relates to Portland, do you?

A. Only shipments which are destined to Portland it covers.

Q. But there is nothing about the point of delivery in Portland being tied up specifically to a regular landing place in Portland, is there?

A. No. [107]

Q. Now, the next paragraph: "On northbound carload freight, consigned to firms located on industrial tracks, this company will, when consignees desire to take delivery by switching freight in cars from dock to warehouse, load such freight into cars free of charge." Now, there isn't a word there said about a particular landing place, is there? So if a man had freight going to North Portland, this company agrees there if he desires to switch in freight-cars to load into the freight-cars free of charge. That could be accomplished on Municipal Terminal No. 4, couldn't it? A. It could.

Q. Or any other dock, whether it was the regular landing place or not? A. It could.

Witness rests.

Testimony of J. W. Mount, for Defendant.

J. W. MOUNT, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. COCHRAN.

I am Assistant General Freight Agent of the

(Testimony of J. W. Mount.)

Union Pacific System, Portland, Oregon. This System includes The San Francisco and Portland Steamship Company. During Federal control of railroads I was Special Examiner for the Portland District Freight Traffic Committee of the United States Railroad Administration. I have been engaged in handling tariffs and traffic in the traffic department of the transportation companies approximately twenty years, and am acquainted with traffic matters, tariffs, their making, how the amounts of charges are arrived at, and have had experience in determining the reasonableness of rates. I am acquainted with the Steamship Company's rates from San Francisco to Portland, also the rates by rail lines from San Francisco to Portland, and have made comparisons between [108] the two. The water rate from San Francisco to Portland, carloads, on May 10, 1916, was 15 cents per 100 pounds. The rate by Southern Pacific on the same commodity from San Francisco to Portland was 20 cents per 100 pounds. The normal rate on sugar by water on this date was the fifth class rate. The normal basis of rates were departed from for different reasons, and in this particular instance the commodity rate was less than the normal class rate to meet competition of steam schooners and other lines of steamships operating between San Francisco and Portland, who do not file their tariffs with the Interstate Commerce

(Testimony of J. W. Mount.)

Commission. I have particularly in mind the steamship lines of the Parr McCormick Company. Their business is the transportation of lumber from Portland to San Francisco, but they bring cargo northbound. By operating in this manner cargo affords ballast as well as reducing operating expenses. They are permitted to make a very low rate. The rate on sugar from San Francisco to Portland via water line was really below normal and reasonable rate in that it was established to meet competitive conditions over which they had no control or over carriers which were not subject to governmental control, and who could make rates at their pleasure. There is no competition at North Portland with any of plaintiff's assignors in the line of similar business dealing in sugar at that point.

Cross-examination by Mr. WILSON.

Municipal Dock No. 4 is located at St. Johns Terminal, ordinarily referred to as St. Johns Terminal. It is on the line of Oregon-Washington Railroad & Navigation Company. Rule 20 of the San Francisco and Portland Steamship Company's Northbound Local Tariff No. 8 naming class and commodity rates from San Francisco and Portland effective August 25, 1920, reads as follows:

> "On carload freight, billed to rail points beyond Astoria or Portland, Oregon, the cost of loading such [109] freight in cars to-

(Testimony of J. W. Mount.)

gether with cost (as lawfully on file with the Interstate Commerce Commission and when such charge is not absorbed by connecting carrier) of switching such cars from this carrier's regular place of landing at Astoria or Portland to the railroad, will be assumed by this carrier."

There is a note immediately following this rule which reads as follows:

"Note: The St. Johns (or Peninsula) Tunnel and Willbridge, Oregon, will be considered hereunder a 'rail point beyond Portland, Oregon.'"

Willbridge is opposite St. Johns on the west side of Willamette River, on the line of the Spokane Portland & Seattle Railway Company. The San Francisco and Portland Steamship Company gets out circulars the same as other lines, advertising matter, that its place of leaving and landing is Ainsworth Dock, foot of Second Street, for passengers only, that is, not for freight. This circular says that Portland sailings will be from Ainsworth Dock, foot of Second Street, and I never knew them to take passengers at any other place but Ainsworth Dock, but they take freight at different places in the City of Portland. The amount of freight to be received at other places in the City of Portland is left largely to the discretion of the General Manager of the Company, but they don't obligate themselves to stop for anything less than 200 tons and that only at the

(Testimony of J. W. Mount.)

Steamship Co.'s. option. It has a right to get freight at all points in the city at its option. The tariffs make the broad statement that the rates apply between San Francisco and Portland, and, of course, Portland includes a large terminal territory, but it does not include North Portland. The San Francisco and Portland Steamship Company does not publish any rate to North Portland except it is a party to tariffs naming rates to North Portland in connection with rail haul transferred at Portland.

Redirect Examination by Mr. COCHRAN.

The situation, summing it up, is that the tariffs recite charges on sugar, for example, The San Francisco and Portland Steamship Company's [110] haulage from San Francisco to Portland without stating in these tariffs as to what part of Portland it will be received or delivered. The combination tariffs filed by Oregon-Washington Railroad & Navigation Company on behalf of itself and of the Steamship Company, which have been referred to here as being in effect during the time the various shipments moved between San Francisco and North Portland plainly says San Francisco and Portland Steamship Company, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. These tariffs would be complied with on a shipment moving from San Francisco to North Portland if the Steamship Company shall have passed the traffic over Municipal Terminal No. 4 as a connection between water and rail line bound for North Port-

(Testimony of J. W. Moun)

land. There is a line of railroad extending from North Portland to Municipal Terminal No. 4 owned by the Oregon-Washington Railroad & Navigation Company, and likewise a line of railroad from North Portland up into the business section of Portland around the Albina Yards and across the Willamette River by a railroad bridge to a connection with the tracks of the Northern Pacific Terminal Company in Portland, and thence to the Ainsworth Dock on the west bank of the Willamette River. The distance from San Francisco to North Portland via Municipal Terminal No. 4 is shorter than the distance from San Francisco to the Ainsworth Dock in Portland, Oregon, although it is possible because of the tracks being physically laid that way for traffic if any shall have moved from San Francisco to North Portland to come over the Ainsworth Dock, that is, come up by water to the Ainsworth Dock, pass over the dock to rail connection, and thence to North Portland, and the same movement is possible if traffic shall have still moved from Municipal Terminal No. 4.

(The witness then examined Defendant's Exhibit "A" for the purpose of identifying it a little stronger than was done by the witness Parrington.) [111]

Defendant's Exhibit "A" contains a legend index to Port facilities. No. 2 in this index refers to "Portland Municipal Terminal No. 4, Grain Elevators, etc.," and upon the map in a small circle at

(Testimony of J. W. Mount.)

Municipal Terminal No. 4 is a figure 2. Likewise on the map are a number of small circles with figures therein which will furnish an index to ascertain the name of the facility to which the figures refer. Ainsworth Dock is marked "No. 57," and by finding the figures 57 in a circle upon Exhibit "A" will give us the location of Ainsworth Dock. The red line extending from North Portland south, which crosses the Willamette River, and marked "Spokane, Portland & Seattle Railroad" correctly shows the relative location of that line. Summing up the situation, North Portland is more distant from San Francisco than Portland by a route passing from Ainsworth Dock, and it is less distant by a route passing over Municipal Terminal No. 4, and the tariffs in effect at the time of the movement of these various shipments mentioned in the complaint permit either movement, that is, via Ainsworth Dock to rail connection, or via Municipal Terminal No. 4 to a rail connection.

Recross-examination by Mr. WILSON.

As far as the tariffs are concerned and as far as the rates are concerned, it is possible for every shipment moving by The San Francisco and Portland Steamship Company and thence by Oregon-Washington Railroad & Navigation Company to North Portland to move through the Ainsworth Dock.

Thereupon Mr. Wilson asked witness the following question:

Q. And that would be the natural and customary route, would it not?

(Testimony of J. W. Mount.)

Mr. COCHRAN.—I object to that as immaterial. We have a law question involved as to whether Portland is intermediate to North [112] Portland.

COURT.—That is a question of fact, isn't?

Mr. COCHRAN.—A question of fact, yes, but it is to be determined not by what is possible. There are no shipments from San Francisco to North Portland.

COURT.—He can answer the question.

(To which ruling defendant excepted, and his exception was duly allowed.)

A. I will answer it by saying yes.

The municipal authorities of the City of Portland operating Municipal Dock No. 4 do not file tariffs with the Interstate Commerce Commission. They simply publish a wharf charge not subject to the Act to Regulate Commerce.

Thereupon the following questions and answers were given:

Q. If The San Francisco and Portland Steamship Company, in connection with the Oregon-Washington Railroad & Navigation Company, was moving over the Municipal Dock, does it publish any charge in connection with use of the Municipal Dock? Or does it absorb it?

A. Municipal Dock?

Q. Yes, No. 4.

A. I have just stated I am not familiar with their tariffs because they change oftener than the moon does.

(Testimony of J. W. Mount.)

Q. I am asking you the O.-W. R. & N. tariff under which you say it could move through the Municipal Dock—I am asking you whether or not in the O.-W. R. & N. Company, or The San Francisco and Portland Steamship Company publishes anything in regard to the use of the terminal, or the taking of the stuff over the terminal? A. Yes.

Q. What is it?

A. If the through rate includes any—if we have a through rate [113] published from San Francisco to Portland, it would include the charges at Municipal Dock Terminal No. 4.

Q. Does it publish anything? You know there is a charge made there for every ton that goes over the Municipal Dock. The City gets a charge on it.

A. They get a charge from somebody, yes, but on a through rate from San Francisco to Portland, or San Francisco to North Portland via Municipal Dock No. 4, the O.-W. R. & N. Company would have absorbed that charge.

Q. They don't publish any such absorption, do they?

A. The through rate is the absorption itself.

Q. But do they publish they will absorb any such charge?

A. Well, the rate itself includes it. We couldn't publish a rate—we don't say will be any charge. That is the way we publish the rate, we publish it through.

Q. All right. Then you say your tariff does not

(Testimony of J. W. Mount.)

publish the absorption of any charge at the Municipal Wharf?

A. No, sir; I don't say so. I say that the rate itself includes that charge. When you publish a through rate between two points, that means we have to perform the service to get from that one point to the other; that is self-evident. If you were shipping freight and paying freight charge, and the tariff was a rate from San Francisco to North Portland of say, 15 cents per hundred, you would not pay more, and we couldn't collect more. We can only collect what we file with the Commission.

Q. If the City of Portland publishes this charge, somebody has to pay.

A. If we in our tariff say we will handle a shipment from San Francisco to North Portland for 15 cents, not going to charge wharfage or switching or anything; that includes all service performed. [114]

Q. Do you publish the fact in your tariff you will absorb any charge at the Municipal Wharf for any tonnage that goes across the wharf?

A. You mean do we by specific expressions say that?

Q. Yes, I do.

A. We don't come out and specially say so, because we don't have to, and because—

Q. That is a matter of law whether you have to or not.

A. Let me finish my answer. As an expert tariff man for the past 12 or 15 years, it has been my prac-

(Testimony of J. W. Mount.)

tice when I publish a through rate from one point to another, that includes all service incident to getting that traffic from Point A to Point B, for instance.

Q. You don't specifically publish, however, in case it goes over the Municipal Dock that you will absorb that charge?

A. It is so stated when you publish the rate.

Q. But you do have facilities whereby you can handle it over your own property, don't you?

A. Yes, we could do it.

Q. And that is the way you ordinarily do it, isn't it? A. Not altogether.

The witness continued: All sugar going on the Oregon-Washington Railroad & Navigation Company's line coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically sugar can transfer from water to rail at Municipal Dock No. 4, and that it is just as good if not a better physical connection than at Ainsworth Dock.

Testimony of Charles E. Cochran, for Defendant.

CHARLES E. COCHRAN, attorney for defendant, called as a witness on behalf of defendant testified as follows, without interrogatories: [115]

Mr. COCHRAN.—I am Secretary of The San Francisco and Portland Steamship Company, and have been such since about August, 1918. I have been, however, since 1912, one of the attorneys for this company and have handled its business in con-

(Testimony of Charles E. Cochran.)

nection with these contracts, and the like, and am acquainted with its relationship with the United States Shipping Board. I have in my hand a telegram having the purport of being dated October 12, 1917, from Washington, D. C., addressed to The San Francisco and Portland Steamship Company, signed by Bainbridge Colby, Commissioner. This tele gram is a part of the records and files of The San Francisco and Portland Steamship Company, and I have been acquainted with it since the time of its receipt in 1917 till the present time. I offer the document in evidence, and ask to have it marked as Defendant's Exhibit "B," and would like to substitute copy and withdraw the original, so that the copy may have the same force and effect as the original.

Mr. WILSON.—I object to the offer on the ground that the telegram is irrelevant and immaterial to this controversy. I don't object to the fact that the telegram is not identified, if Mr. Cochran says it is the original telegram.

Mr. COCHRAN.—It is the original telegram.

COURT.—It will be admitted subject to your objection.

Exception saved.

(Marked Defendant's Exhibit "B.")

Mr. COCHRAN.—(Reading:)

"Washington, D. C., October 12, 1917.

Defendant's Exhibit "B."

San Francisco & Portland SS. Co.,
Pier 40, San Francisco, California.

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below, and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon. [116]

1. The ships affected by said requisition and included therein are (A) all cargo ships able to carry not less than 2,500 tons total dead weight, including bunkers, water and stores.

(B) All passenger steamers of not less than 2,500 tons gross register.

2. (A) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inland cargo and ship is put in ordinary good condition.

(B) As to steamers which have started to load their outward cargo requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

4. Steamers that are occupied in trades between

foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (A) Owners whose steamers are operating in the irregular trades are to continue the operations of their steamer for account of the Government as they have been doing for themselves, until they received further instructions.

(B) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers. Asknowledge.

(Signed) BAINBRIDGE COLBY,
Commissioner."

Mr. COCHRAN.—Now, the steamer "Rose City" had a capacity of 2,800 tons dead weight, and the steamer "Beaver" was 2,500 tons dead weight. [117] When that telegram was received, Mr. Blair, our general manager, turned the ships over to the Government, and began operating for the Government, pursuant to the last paragraph, pursuant to Paragraph 5–A of the telegram, directing owners whose steamers are operating in their regular trade to continue operation of their steamers for account of the Government as they have been doing for themselves, until they received further instructions. The steamers were thus operated until the month of January, 1918, when the United States Shipping

Board and The San Francisco and Portland Steamship Company signed up a requisition.

Mr. WILSON.—I would like an objection and exception to all of this.

COURT.—Yes.

Mr. COCHRAN.—A requisition charter-party of which I have in my hand the originals. Each boat was made the subject of a requisition charter, and I would like to offer these charter-parties in evidence, substituting copies for the originals, and withdrawing the originals, the copies to have the force and effect the originals would have.

Mr. WILSON.—I object to the offer on the ground the same are immaterial and irrelevant to this controversy.

COURT.—Admitted subject to your objection.

Mr. COCHRAN.—I would like to have them marked respectively, that of the steamer "Beaver," "C," and that of the "Rose City," "D."

(Marked Defendant's Exhibit "C" and "D.")

Mr. COCHRAN.—The part of which to which I specially desire to direct your attention reads as follows: "This requisition charter made and concluded upon in the District of Columbia the 14th day of January, 1918, between the San Francisco and Portland Steamship Company of Utah, owner of the good American single-screw steamship 'Beaver' of San Francisco, of 4507 tons gross register, and 2279 tons net register," etc. * * * "Witnesseth:

Whereas, by requisition order dated October 12, [118] 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, United States has requisitioned the use of the steamship 'Beaver' and the steamship has been delivered into the possession of the United States pursuant to the requisition; and

Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner of the use of the steamship so requisitioned. and to define by agreement the rights and duties of the United States, and of the owner with respect to the operation of the vessel under the requisition, and in respect to other matters in connection therewith;

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'Time Form' hereto annexed."

Now, on the second page of the charter-party is the time form and the part I desire to refer to recites as follows:

"Whereas, the United States has determined to deliver possession of the vessel to the owner, to be operated by the owner for the United States";

And again, Paragraph second on the same page which reads:

"The owner shall operate the vessel for the United States, shall provide and pay for all provisions," etc.

Now, when these documents were signed, they were signed by Mr. Farrell, the President of the Steamship Company. As a matter of fact they were signed a few days before the 14th of January, and then sent back to Washington, and then they were—these two returned, and have been in the files of the company ever since. I am acquainted with Mr. Farrell's signature, and the name here, J. D. Farrell, is his signature. [119]

Now, the operations continued under that charter-party, these charter-parties, that is Exhibits "C" and "D" until the 29th day of May, 1918, when The San Francisco and Portland Steamship Company received from the Shipping Board the following telegram, which I desire to offer in evidence, and have marked and substitute a copy for the original, and withdraw the original, the copy to have the same force and effect as evidence as the original would have.

Telegram marked Defendant's Exhibit "E" and read as follows: ,

Defendant's Exhibit "E."

"Washington, D. C., May 24, 1918.

San Francisco & Portland Steamship Company,
Pier 40, San Francisco, California.

Five days notice is hereby given of the cancellation of requisition charter on Steamships 'Beaver'

and 'Rose City' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to such vessels.

UNITED STATES SHIPPING BOARD."

Mr. COCHRAN.—This was received by our general manager, according to the notation in the evening, 6:25 P. M. May 24th. I call your attention to Paragraph third, Page 1 of the charter-party, of these exhibits "C" and "D," which reads as follows:

"Third: Upon giving five days' written notice to the owner United States may at any time when the vessel is in a United States port cancel this requisition charter without prejudice to the approved rights of either party."

Now, when Defendant's Exhibit "E," the telegram from United States Shipping Board cancelling the requisition charter was received, The San Francisco and Portland Steamship Company was a little bit up in the air whether they were under Federal control or whether the company itself would have to operate it. The matter was taken up with Mr. C. R. Gray, director of the division of operation of the United States [120] Railroad Administration, and finally he constituted his organization for the purpose of operating the boat—operating the "Rose City." The steamer "Beaver" having been in the meantime commandeered by the United States Navy. So Mr. Gray wrote a letter to Mr. Farrell, President of the Oregon-Washington Rail-

road & Navigation Company, the original of which is in our files, but which I would like to retain in the files, and substitute a copy, and the document which I have and will ask to be marked is such copy, and I personally know that to be a copy.

Mr. WILSON.—Objected to as irrelevant and immaterial.

COURT.—Admit it, subject to your objection.

Mr. WILSON.—Save an exception.

(Marked Defendant's Exhibit "F.")

Defendant's Exhibit "F."

"July 12, 1918.

President.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General.

Division of Operation,

C. R. GRAY, Director.

Interstate Commerce Building,

Washington.

At San Francisco, July 11, 1918.

Mr. J. D. Farrell,

President, Oregon-Washington Railroad & Navigation Company, Portland, Oregon.

My dear Sir:

The operation of the ships and facilities of The San Francisco and Portland Steamship Company for the United States Railroad Administration will be placed under the jurisdiction of Mr. J. P.

O'Brien, General Manager, Oregon-Washington Railroad & Navigation Company.

Mr. G. L. Blair as general manager of The San Francisco and Portland Steamship Company will continue in charge of the same as general manager, reporting to Mr. O'Brien.

The Shipping Board have definitely decided that they will not [121] charter the SS. 'Alvarado,' but are favorably disposed towards chartering the SS. 'Blandon,' and an effort is now being made by wire to definitely charter this vessel for a two months' trial period on the bare boat basis, and if chartered, this boat will be turned over to Mr. Blair for freight operation between Portland and San Francisco.

Yours very truly,

(Signed) C. R. GRAY."

Mr. COCHRAN.—Now, the charter-parties, Defendant's Exhibits "C" and "D," make reference to the President's Executive Order of the 11th of July, 1917. I assume the Court will take judicial knowledge of that order, but for the purpose of refreshing the memory of the Court, it reads as follows:

"By virtue of authority vested in me in the section entitled 'Emergency Shipping Fund,' of an Act of Congress entitled 'An Act making Appropriation to supply Urgent Deficiencies in Appropriations for the Military and Naval Establishments

on account of War Expenses for the Fiscal Year ending June 30th and for other purposes," approved June 15, 1917. I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said Act insofar as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials and ship construction.

And I do further direct that United States Shipping Board shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to, and in furtherance of the taking over of title or possession, by purchase or requisition, of [122] constructed vessels or parts thereof, or charters therein; and the operation, management and disposition of such vessels and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board, or by it through the United States Shipping Board Emergency Fleet

Corporation, or through any other corporation organized by it for such purpose.

(Signed) WOODROW WILSON,

The White House, 11 July, 1917."

It is Government Document No. 2664.

Mr. WILSON.—The San Francisco and Portland Steamship Company never cancelled its tariff for shipments between San Francisco and Portland.

Mr. COCHRAN.—Well, I don't know, I am sure, but my understanding is that everything went right on as before.

Mr. WILSON.—The "Rose City" and "Beaver" continued to operate between San Francisco and Portland during this entire period?

Mr. COCHRAN.—Yes; there was no cessation of the movement of the boats.

Mr. WILSON.—And they continued to handle shipments tendered to the agent at San Francisco, the same as before that time.

Mr. COCHRAN.—Yes, they did just as the telegram, this Exhibit "B" said to do, namely, to operate their regular trades — operate in their regular trades, and the company did continue the operation of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.

Mr. WILSON.—And the company issued its own bills of lading?

Mr. COCHRAN.—Well, the form will show here.

On these [123] forms, now, it has been my observation throughout the Railroad Administration as well as the steamship operation, that the stationery, such as the forms of bills of lading, waybills, expense bills, and other forms in use in the handling of traffic, were used precisely the same after Government control, as before Government control. But I don't consider that it made a corporation contract because the Government used that form.

(Defendant's Exhibits "C" and "D," being respectively charter-parties of the steamers "Rose City" and "Beaver" to United States Shipping Board, are hereto attached and made a part of this bill of exceptions.)

Mr. COCHRAN.—I desire to request special findings in this case in favor of the defendant. I desire also a special finding if your Honor shall find for plaintiff in any amount, excluding all computation for damages in respect to all shipments which moved to Portland because it is not shown that on the Portland shipments, either on the line or route outlined by the tariff, or by the line or route, or by any line geographically considered, that Portland is intermediate to North Portland. I urge this finding upon the grounds further, as stated in the demurrer to the complaint, and among which may be mentioned that this Court has no jurisdiction of the subject matter of this action.

That jurisdiction is lodged solely in the Interstate Commerce Commission, and complaint in this case fails to state facts sufficient to constitute a cause of action.

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the Court a request for findings and judgment for the plaintiff in the manner following: [124]

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney James G. Wilson of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the evidence having been submitted by both parties, the Court being fully advised, does now make and find from the issues presented by the pleading and the evidence offered the following

FINDINGS OF FACT.

I.

That the Oregon, Washington Railroad & Navigation Company, pursuant to Section 5 of the Act of Congress known as the Act to Regulate Commerce as Amended by the Act of Congress of August 24th, 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as

the owner of the stock of the San Francisco & Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the said San Francisco & Portland Steamship Company between San Francisco and Portland after the 1st day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon, Washington Railroad & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company and that said line was being operated in the interests of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that said Oregon, Washington Railroad & Navigation Company might continue the operation of said [125] line and the ownership of said stock subsequent to July 1st, 1914; that said Interstate Commerce Commission in said order granting permission also ordered the San Francisco & Portland Steamship Company to file with the Commission all of its tariffs, rules and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco & Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon,

Washington Railroad & Navigation Company its rates between San Francisco and North Portland on sugar; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the said San Francisco & Portland Steamship Company.

II.

That in and by the schedule of tariffs filed by the defendant in connection with the Oregon, Washington Railroad & Navigation Company said defendant established and put in effect a rate on sugar in carload lots of 30,000 pounds minimum from San Francisco to North Portland, which said rate so published, filed, and put in effect was twelve and one-half (12½¢) cents per hundred pounds at all times between February 17th, 1916, to and inclusive of the 28th day of December, 1917, and was fifteen and one-half (15½¢) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 25th day of August, 1920, and was nineteen and one-half (19½¢) cents per hundred pounds from and inclusive of August 26th, 1920, until April 30th, 1921; that the defendant carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco [126] and Portland, and all shipments of sugar from San Francisco to

Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments originating between the 17th day of February, 1916, and the 28th day of December, 1917, charged and collected therefor for its transportation charges at the rate of fifteen (15¢) cents per hundred pounds; on all shipments originating between the 1st day of March, 1920, and the 25th day of August, 1920, charged and collected the sum of nineteen (19¢) cents per hundred pounds; and that on all shipments shown in said exhibits from and after the 27th day of August, 1920, the sum of twenty-four (24¢) cents per hundred pounds was charged and collected; and in addition to such charges, collected and received on all such shipments war tax at the rate of 3% of the freight charged.

III.

That all of said charges at said rates were paid by the plaintiff's assignors to the defendant, that the amount of the excess charges so collected by the defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, was and is the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64), and the amount of such excess charges so collected by the defendant from and

including the 1st day of March, 1920, to and including the 25th day of August, 1920, was and is the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07), and the amount of such excess charges so collected on the shipments included in the complaint and in the stipulation amending the complaint subsequent to the 25th day of August, 1920, was and is the sum of Six Thousand Fifty-one and 98/100 Dollars ($6,051.98). [127]

IV.

That Portland, and Astoria, Oregon, are intermediate between San Francisco and North Portland on the route established by the San Francisco & Portland Steamship Company in connection with the Oregon, Washington Railroad & Navigation Company for shipments of sugar between San Francisco and North Portland, and the defendant charged and collected on all of the shipments to Portland and Astoria a greater sum than its rates established by it in connection with the Oregon, Washington Railroad & Navigation Company on shipments of sugar from San Francisco to North Portland, Oregon, said shipments moving over the same route in the same direction, and the haul from San Francisco to Portland and Astoria being included within the haul over the route so estabished from San Francisco to North Portland, said excess being the amounts shown in the preceding paragraph.

V.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco & Portland Steamship Company that it would at noon on October 15th, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water and stores, and all passenger steamers of not less than twenty-five hundred tons gross register and also notified said San Francisco & Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," and that thereafter formal charters were executed as of October 15th, 1917, covering the steamships "Beaver" and "Rose City," owned by the San Francisco & Portland Steamship Company; that on May 24th, 1918, the United States Shipping Board notified the San Francisco & Portland Steamship Company as follows: "Five [128] days' notice is hereby given of the cancellation of the requisition charter on the steamships "Beaver" and "Rose City," and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VI.

That defendant during all of the time from October 15th, 1917, to and inclusive of noon of the

28th day of December, 1917, continued to issue its bills of lading on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, and collected from the plaintiff's assignors the charges for the transportation of such shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission but continued to accept shipments and assess charges under said tariffs as so filed.

VII.

That the shippers who shipped said sugar over the line of the defendant as listed on the exhibits attached to the plaintiff's complaint and the stipulation amending the complaint, have each and all assigned their claims for the overcharge assessed by the defendant against said shippers to the plaintiff herein, and he is the lawful owner and holder thereof.

VIII.

That the sum of Two Thousand ($2,000.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fees to cover only the work with reference to said collection in this court and not on any appeal therefrom.

Upon the foregoing findings of fact the Court makes the following: [29]

CONCLUSIONS OF LAW.

I.

That the charges assessed against the plaintiff's

assignors for the transportation of sugar in carload lots from San Francisco to Portland and to Astoria was illegal and in violation of the amended Fourth Section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland over the line of the San Francisco & Portland Steamship Company and the Oregon, Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the defendant, having issued its bills of lading and collected the freight charges on shipments between October 15th, 1917, and December 28th, 1917, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the defendant.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of Eleven Thousand Three Hundred Eighty and 69/100 Dollars ($11,380.69), with interest at the rate of six per cent

(6%) per annum on the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent (6%) per annum [130] on the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent (6%) per annum on the sum of Six Thousand Fifty-one and 98/100 Dollars ($6,051.98) from March 1st, 1921, and also Two Thousand Dollars ($2,000.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this —— day of July, 1921.

And thereupon Mr. Cochran, as attorney for defendant, submitted in writing to the Court the following objections to findings of fact and conclusions of law proposed and requested by the plaintiff:

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the defendant and objects and excepts to certain findings of fact and conclusions of law requested by plaintiff in the manner following, that is to say:

I.

Defendant objects to Finding of Fact I, alleging said finding to be immaterial for that the San Francisco and Portland Steamship Company, and its operations by water are not in any respect subject

to the Act to Regulate Commerce, nor does the Fourth Section of said Act to Regulate Commerce apply thereto, nor does the Act of Congress of August 24, 1921, entitled, "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the Sanitation and Government of the Canal Zone," commonly known as the "Panama Canal Act" subject said company and its operations to the regulations of the Act to Regulate Commerce.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was [131] duly allowed.

II.

Defendant objects and excepts to Finding of Fact II alleging same to be immaterial to any proper or legal issue in this case.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

III.

(a) Defendant objects and excepts to all that portion of Finding of Fact III reciting that excess charges collected by defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland was the sum of $2,648.64, for the reason that if said charges were

collected recovery thereof is barred by the Statute of Limitations, since the cause of action did not accrue thereon within two years immediately prior to the filing of the complaint herein, and plaintiff's remedy, if any, thereon has been barred by law.

(b) Defendant objects to the remainder of the said Finding of Fact III alleging same to be immaterial to any proper or legal issue in this case, and for the further reason that defendant from the 15th day of October, 1917, to the 29th day of December, 1917, was operating its boats solely as agent for the United States Shipping Board.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed. [132]

IV.

Defendant objects and excepts to Finding of Fact IV, as proposed by plaintiff, for the reason same is not supported by the evidence, particularly with respect to that portion of the findings which recites Portland as intermediate between San Francisco and North Portland.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

V.

Defendant objects and excepts to Finding of Fact VI for the reason that bills of lading issued for shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint

and other contracts of carriage of said freight were, in effect, made as agent for the United States Shipping Board, and not upon its own behalf as principal that the said United States Shipping Board was principal in said transactions, all of which the plaintiff well knew.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

VI.

Defendant objects and excepts to Finding of Fact VIII, and particularly to that part allowing attorneys' fees for the collection of said alleged overcharges, and avers that since there were no overcharges no attorneys fees can be properly allowed.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed. [133]

VII.

Defendant objects and excepts to Conclusion of Law I, to the effect that the charges collected from plaintiff's assignors were legal and in violation of the amended Fourth Section of the Act to Regulate Commerce, and alleges a proper conclusion of law to be that defendant only collected charges on sugar from the 17th day of February, 1916, to and inclusive of the 15th day of October, 1917, and from the 1st day of March, 1920, to the 25th day of August, 1920, and then only at the proper legal and valid tariff rates, and that the cause of action of

plaintiff, if any he has, in respect to the charges collected on shipments from the 17th day of February, 1916, to the 28th day of December, 1917, did not accrue within two years prior to the commencement of the action, and is therefore barred by law.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

VIII.

Defendant objects and excepts to Conclusion of Law II, alleging same to be erroneous.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

IX.

Defendant objects and excepts to Conclusion of Law III, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that defendant is not liable to plaintiff in any amount.

The Court overruled said objection, to which ruling of the [134] Court counsel for the defendant excepted and his exception was duly allowed.

X.

Defendant objects and excepts to Conclusion of Law IV alleging same to be erroneous, and that a proper conclusion is that defendant is entitled to judgment against the plaintiff for its costs and disbursements.

The Court overruled said objection, to which rul-

ing of the Court counsel for the defendant excepted and his exception was duly allowed.

XI.

Defendant objects generally to a judgment in favor of the plaintiff for any sum of money, and requests a judgment in favor of defendant for the reason that the testimony properly supports such judgment.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

The Court thereupon signed the findings of fact and conclusions of law requested by the plaintiff and ordered same filed as the decision of the Court in said cause, to which ruling of the Court counsel for the defendant excepted and exception was duly allowed, whereupon a judgment was entered for the plaintiff and against the defendant as follows:

This matter coming on, on application of plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the Court having heretofore filed its findings of fact and conclusions of law, [135] and being fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant San Francisco & Portland Steamship Company, a corporation, judg-

ment in the sum of Eleven Thousand Three Hundred Eighty and 69/100 Dollars ($11,380.69), together with interest at the rate of six per cent per annum on the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent per annum on the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent per annum on the sum of Six Thousand Fifty-one and 98/100 ($6,051.98) Dollars from March 1st, 1921, and also Two Thousand Dollars ($2,000) as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of Eighteen 26/100 Dollars, and that execution issue therefor.

Done and dated in open court this 5th day of August, 1921.

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above-entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above-entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the Court on the questions of law

presented, and that exceptions taken by the defendant therein were duly taken and allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed [136] by the rules of this Court as extended by stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above-entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

Due legal service of the within bill of exceptions prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 17th day of September, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 21, 1921. G. H. Marsh, Clerk. [137]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [138]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The San Francisco and Portland Steamship Company, a corporation, defendant in the above-entitled action, conceiving itself aggrieved by the final order and judgment of this Court made and entered against it and in favor of the plaintiff on the fifth day of August, 1921, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto and the rulings of the court thereon as set forth in its assignments of error filed herein, petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in the behalf made and provided;

And also that an order be made fixing the amount of security which the defendant shall give and fur-

nish in said writ of error and that upon giving such security all further proceedings in *the be* stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage of the defendant herein.

The defendant has filed herewith its assignments of error upon which it relies and will urge in the said United [139] States Circuit Court of Appeals.

WHEREFORE defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of and that a transcript of the record of proceedings, papers, and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in its answer.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [140]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [141]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Assignments of Error.

Comes now the defendant above named, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorney of record, and says that the judgment and final order of this court, made and entered in the above-entitled court on the 5th day of August, 1921, in favor of the plaintiff above named and against the defendant above named, is erroneous and against the just rights of the defendant, and files herein together with his petition for writ of error from said judgment and order the following assignments of error which he avers occurred upon the trial of said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint.

II.

The Court erred in admitting in evidence over the objection and exception of defendant the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company under the provision of section 5 of the Act to regulate Commerce as amended by the Panama Canal Act, in connection with the ownership of the San Francisco and Portland Steamship Company, said opinion being reported in 34 I. C. C. 165.

III.

The Court erred in overruling defendant's objection to Finding of Fact No. I and in not sustaining said objection for the reasons therein stated. [142]

IV.

The Court erred in overruling defendant's objection to Finding of Fact No. II and in not sustaining same, and erred in holding that this defendant in the operation of its vessels between the ports of Portland, Oregon, and San Francisco, California, was and is subject to the Act to Regulate Commerce or made subject thereto by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," commonly known as "The Panama Canal Act."

V.

The Court erred in overruling defendant's objection to Finding of Fact No. III and in not sustaining same, said objection being that the excess charges collected by defendant from plaintiff's assignors between the 17th day of February, 1916, and the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, in the sum of two thousand six hundred and forty-eight and 64/100 dollars ($2,648.64) was barred by the statute of limitations since the cause of action of plaintiff did not accrue within two years immediately prior to the filing of the compiaint, and further objects that collections for freight charges made during the period from October 15, 1917, to the 29th day of December, 1917, were made by defendant in its capacity as agent and operator of the vessels for the United States Shipping Board.

VI.

The Court erred in overruling defendant's objection to Finding of Fact No. VI, which said objection was that the contracts of carriage of said freight of which Plaintiff's [143] Exhibit Nos. 5 and 6 were typical, were, in effect, made as agent for the United States Shipping Board and not on behalf of the defendant as principal and that the United States Shipping Board was the principal in said transactions, all of which plaintiff well knew.

VII.

The Court erred in overruling and not sustaining defendant's objection and exception to conclusion

of Law No. I, and in failing to conclude that defendant collected only the legal, proper, and valid tariff rates, and furthermore that the cause of action of plaintiff, if any he has, in respect to the charges collected on shipments from the 17th day of February, 1916, to the 28th day of February, 1917, did not accrue within the two years immediately prior to the commencement of the action and is therefore barred by law.

VIII.

The Court erred in overruling defendant's objection to Conclusion of Law No. II, in which the Court held defendant liable to shippers on bills of lading and contracts of carriage and collection of charges notwithstanding that the United States Shipping Board had requisitioned the vessels of defendant.

IX.

The Court erred in overruling defendant's objection to Conclusion of Law No. III, wherein the Court held defendant liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved. [144]

X.

The Court erred in overruling and not sustaining defendant's objection to Conclusion of Law No. IV, and entering judgment wherein not a judgment is held proper against defendant, for the sum of eleven thousand three hundred and eighty and 69/100 dollars ($11,380.69), on which said sum two thousand

six hundred and forty-eight and 64/100 dollars ($2,648.64) was the amount collected prior to the 29th day of December, 1917, and the further sum of two thousand six hundred and eighty 7/100 dollars ($2,680.07), with interest from the 25th day of August, 1920, and the further sum of six thousand and fifty-one 98/100 dollars ($6,051.98), with interest from March 1, 1921, in each case at six per cent (6%) per annum, and the further sum of two thousand dollars ($2.000.00) as attorney's fees.

XI.

The Court erred in overruling defendant's objection generally to a judgment in favor of plaintiff for any sum of money and in not entering judgment as requested in its favor for the reason that the testimony properly supports such judgment.

XII.

The Court erred in failing to enter a judgment for defendant as requested and in not giving judgment in favor of defendant for the dismissal of plaintiff's complaint.

XIII.

The Court erred in holding and finding that Portland was a point intermediate to North Portland upon the route between San Francisco, California, and North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad and Navigation Company at the time of the movement of the respective shipments, and in failing to conclude North Portland to be a point nearer to San Francisco than Portland. [145]

XIV.

The Court erred in entering judgment in favor of the plaintiff and against defendant as indicated in the findings of fact and conclusions of law which the court filed as its decision in this case.

XV.

WHEREFORE, the said defendant and plaintiff in error prays that said judgment of the District Court be reversed with directions to the District Court to enter a judgment in favor of the defendant.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, this 27th day of September, A. D. 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [146]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [147]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein and include in said transcript the following proceedings, papers, records, and files, to wit:

1. The plaintiff's complaint with amendments and supplemental demands.
2. Defendant's demurrer.
3. Answer.
4. Reply. ....
5. Bill of exceptions and certificate omitting exhibits attached thereto.
6. Judgment.
7. Petition for writ of error.
8. Assignments of error.
9. Order allowing writ of error and fixing bond.
10. Supersedeas bond and bond for costs.

11. Writ of error.
12. Citation on writ of error. [148]
13. Stipulations as to printing record.
14. This praecipe and any and all records, entries, orders, papers, proceedings, and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [149]

AND AFTERWARDS, to wit, on Wednesday, the 28th day of September, 1921, the same being the 75th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [150]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Minutes of Court—September 28, 1921—Order Allowing Writ of Error.

This 28th day of September, 1921, came the defendant above named, The San Francisco and Portland Steamship Company, a corporation, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorneys and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this court, made and entered on the 5th day of August, 1921, in favor of the plaintiff abovenamed and against said defendant and the findings of fact and conclusions of law made or refused on the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be

sent to the said Circuit Court of Appeals for the Ninth Circuit and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration thereof, this Court does allow said writ of error upon said defendant filing with [151] the clerk of this court a good and sufficient bond in the sum of $15,000.00, to the effect that if said defendant, The San Francisco and Portland Steamship Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 28th day of September, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [152]

AND AFTERWARDS, to wit, on the 28th day of September, 1921, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [153]

In the District Court of the United States for the District of Oregon.

L.–8748.

A. J. PARRINGTON,
Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that the San Francisco and Portland Steamship Company, a corporation, principal, and National Surety Company of New York, a corporation, surety, are hereby and firmly bound unto A. J. Parrington, the above named plaintiff in the sum of $15,000.00, to be paid to the said A. J. Parrington, to which payment well

and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated the 27th day of September, 1921.

WHEREAS, the above-named San Francisco and Portland Steamship Company is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 5th day of August, 1921:

Now, the condition of this obligation is such that if the above-named The San Francisco and Portland Steamship Company, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good this plea, then this obligation to be void; otherwise to be and remain in full force and effect.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
By C. E. COCHRAN,
One of Its Attorneys.

THE NATIONAL SURETY COMPANY, OF NEW YORK.
By E. P. WELCH,
Resident Vice-President. [153½]

[Seal] Attest: D. E. GORTON,
Resident Assistant Secretary.

Countersigned at Portland, Oregon, this 27th day of September, 1921.

E. P. WELCH,
Resident Agent.

Examined and approved this 28th day of September, 1921.

R. S. BEAN,
District Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921, G. H. Marsh, Clerk. [154]

AND AFTERWARDS, to wit, on the 3d day of October, 1921, there was duly filed in said court a stipulation as to transcript of record, in words and figures as follows, to wit: [155]

In the District Court of the United States for the District of Oregon.

L.—8748.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Stipulation as to Transcript of Record.

It is stipulated and agreed by and between counsel for the respective parties that in preparing a certified copy of the record, the clerk of this court may omit the preparation of copies of the original exhibits

physically attached to the bill of exceptions and except such exhibits from the effect of his certificate.

Dated at Portland, Oregon, this 27th day of September, 1921.

C. E. COCHRAN,
Attorney for Plaintiff in Error.
WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Filed October 3, 1921. G. H. Marsh, Clerk. [156]

AND AFTERWARDS, to wit, on the 28th day of October, 1921, there was duly filed in said court a stipulation relative to exhibits in words and figures as follows, to wit: [157]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Stipulation Re Original Exhibits.

WHEREAS, Defendant's Exhibits "C" and "D" in the above-entitled action consists of a Requisition Charter respectively of the steamers "Beaver" and "Rose City" owned by the San Francisco & Portland

Steamship Company, but the subject of charter to the United States Shipping Board; and

WHEREAS, said exhibits are in words and figures the same except Exhibit "C" is for the steamer "Beaver" and Exhibit "D" is for the steamer "Rose City"; and

WHEREAS, the above-entitled action was consolidated for trial with the action of A. J. Parrington vs. James C. Davis, Agent, United States Railroad Administration, which case is also being taken to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, it is stipulated and agreed by and between the counsel for the respective parties that Defendant's Exhibit "D" may be attached to and made a part of the bill of exceptions and that same may also serve as Defendant's Exhibit "C" as well, so that Exhibit "C" may be attached to the bill of exceptions in the case of A. J. Parrington vs. James C. Davis, Agent, United States Railroad Administration.

Dated at Portland, Oregon, this 26th day of October, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.
C. E. COCHRAN,
Attorney for Defendant.

Filed October 28, 1921. G. H. Marsh, Clerk.

[157½]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 157, inclusive, constitute the transcript of record upon writ of error in the cause in said court in which A. J. Parrington is plaintiff and defendant in error and San Francisco & Portland Steamship Company, a corporation, is defendant and plaintiff in error; that said transcript has been prepared by me in accordance with the praecipe filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record annexed thereto the original writ of error and the original citation filed in said cause.

I further certify that the cost of the foregoing transcript of record is $54.15 and that the same has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 7th day of October, 1921.

[Seal] G. H. MARSH,
Clerk. [158]

[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed November 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

L.—8748.

October 25, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

Order Extending Time to and Including November 15, 1921, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to November 15, 1921.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Nov. 15, 1921, to File Record and Docket Cause. Filed Oct. 28, 1921. F. D. Monckton, Clerk. Refiled Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Stipulation Re Omission of Exhibits Attached to Complaint.

It is stipulated and agreed by and between counsel for the respective parties that in printing the record in the above-entitled action, the clerk of the Circuit Court of Appeals may omit the printing of the following documents constituting exhibits attached to the complaint:

"A" on page 17 of the transcript.
"B" on page 18 of the transcript.
"C"on page 19 of the transcript.
"D" on pages 20, 21, 22 of the transcript.
"E" on page 23 of the transcript.
"F" on page 24 of the transcript.
"G" on page 25 of the transcript.
"H" on page 26 of the transcript.
"I" on page 27 of the transcript.
"J" on page 28 of the transcript.
"K" on page 29 of the transcript.
"L" on page 30 of the transcript.

"M" on page 31 of the transcript.
"N" on page 32 of the transcript.
"O" on page 33 of the transcript.
"P" and "Q" on page 34 of the transcript.
"R" and "S" on page 35 of the transcript.
"T" on page 36 of the transcript.
"U" on page 37 of the transcript.
"V" on pages 38 and 39 of the transcript.

and also the following supplementary exhibits:

Supplementary Exhibit "C" on page 56 of the transcript.

Supplementary Exhibit "F" on page 57 of the transcript.

Supplementary Exhibit "I" on page 58 of the transcript.

Supplementary Exhibit "U," paragraph 12 of complaint.

Supplementary Exhibit "L" on page 59 of the transcript.

Supplementary Exhibit, "Allen & Lewis," on page 60.

Supplementary Exhibit "V" on page 61 of the transcript.

Supplementary Exhibit "C" on page 62 of the transcript.

and in lieu thereof print this stipulation instead:

Said exhibits present among other things the following typical claims:

(A) Freight Bill No. 246; Way Bill Date 5–19–16; No. 320; Consignor C. & H. Sugar Refining

Co.; Ship Rose City, Voyage 192; Weight 35,287 lbs.; Rate 15¢ freight, including war tax, $52.93; Date paid 5–25–1916; Overcharge claimed $8.32.

The aforesaid claim is typical of all shipments contained in said exhibits originating prior to January 1, 1918.

(B) Freight Bill No. 205; Way Bill Date 8–30–1920; No. 419; Consignor Western Sugar Refinery; Ship Rose City, Voyage 313; Weight 48,001 lbs; Rate 24¢ freight, including war tax, $118.65; Date paid 9–10–20; Overcharge claimed $22.25.

The above claim is typical of all claims contained in said exhibits referring to shipments subsequent to March 1, 1920.

The amount of the claims of which (A) is typical is $2,648.64.

The amount of the claims of which (B) is typical is $8,732.05.

There are a number of claims of which (A) above is typical in respect to shipments between the dates of October 15, 1917, and December 31, 1917, both dates inclusive, the amount of which can be determined by simple computation from the exhibits.

Dated at Portland, Oregon, this 9th day of November, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Ore., 1921.

_____,

Attorney for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Stipulation. Filed November, 1921. ————, Clerk.

No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed December 13, 1921. F. D. Monckton, Clerk.

No. 3800

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. L–8723.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

Stipulation for Consolidation of Causes for Trial.

IT IS STIPULATED AND AGREED between counsel for the respective parties to the above causes

of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First: That the above-entitled three causes of action may be consolidated for trial in the above-entitled court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second: That the transcript of record in the case of James C. Davis, Director General, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, docketed and filed in this court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L–8723, James C. Davis, Agent, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, and the decision of said case shall not follow the order in the other two cases above mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L–8723.

Dated at Portland, Oregon, this 9th day of January, 1922.

C. E. COCHRAN,
Of Counsel for Plaintiffs in Error.
JAMES G. WILSON,
Counsel for Defendant in Error.

Dated: San Francisco, California, January 11, 1922.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Stipulation for Consolidation of Causes for Trial. Filed Jan. 11, 1922. F. D. Monckton, Clerk.

At a stated term to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable ERSKINE M. ROSS, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error.

vs.

PORTLAND SEED COMPANY, a Corporation,
Defendant in Error.

Order of Submission.

ORDERED leave granted Mr. Ben C. Dey, to appear as *amicus curiae;*

FURTHER ORDERED above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as *amicus curiae,* and by Mr. James G. Wilson, counsel for the defendant in error in each of the above-entitled causes, and submitted to the Court for consideration and decision, with leave to Mr. Dey to file a brief as *amicus curiae* within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

At a stated term to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis, etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY,
Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writs of Error to the District Court of the United States for the District of Oregon.

Before ROSS, MORROW and HUNT, Circuit Judges.

On writs of error to review judgments in favor

of shippers for recovery of excess charges by carriers.

PARRINGTON'S CASES.

HUNT, Circuit Judge:

These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916, the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a minimum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods mentioned the rate as per Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June

25, 1918 was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

THE SEED COMPANY CASE.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Huntington, Oregon, thence by Oregon-Washington Railroad and Navigation lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland

Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant than Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the joint rate via the rail and water line. The accuracy of this reasoning depends upon whether the case is to be considered

in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the Court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to

charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' " (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn. R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however, point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co. vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it was unnecessary to apply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly

not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and that neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words "or route," it called for a new, and we believe, a broader interpretation by which the word "route"

is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R., —— U. S. ——, Feb. 27, 1922.) We have here too the circumstance that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as *amicus curiae* it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the contrary intent is to be gathered from the provision of section 206 (a) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose." There is also a further provision that such

action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted carriers to violate the long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as *amicus curiae* has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robinson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of a decision of the Interstate Commerce Commission which was not mentioned in the

pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increases in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other than at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years after the cause of action has accrued and not after. Prior

to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Western R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the

statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respects the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that

court as attorneys' fees, fees for conducting the cases in this court are also allowed (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862. A reasonable fee in case #3799 in this court is $600; in case #3800, $1000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[Endorsed]: Opinion. Filed Jun. 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorneys' fee in the sum of $1000 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered June 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error,

Order Staying Issuance of Mandate, etc.

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED mandate of this court in the above-entitled cause stayed to and including

August 31, 1922, for the purpose of enabling said counsel to perfect a writ of error from the Supreme Court of the United States to the above-entitled court.

Dated: San Francisco, California, June 17, 1922.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed June 17, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Petition for Writ of Error.

Your petitioner, The San Francisco and Portland Steamship Company, plaintiff in error in the above-entitled cause, respectfully shows:

That said cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that judgment has been therein rendered on the 5th day of June, 1922, affirming the judgment of the District Court of the United States, for the District of Oregon.

The matter in said action exceeds One Thousand Dollars, besides costs, and the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the action or controversy, being aliens or citizens of the United States, or citizens of the different states; this action does not arise under the patent laws nor the revenue laws, nor the criminal laws, nor is it an admiralty cause, but is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

This petitioner therefore respectfully prays that a writ of error be allowed it in the above-entitled action, directing the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, to send the record and proceedings in said action, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
By ARTHUR C. SPENCER,
C. E. COCHRAN,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for, upon the plaintiff in

error giving bond according to law, in the sum of Fifteen Thousand ($15,000.00) Dollars.

W. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, July 31st, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

[Endorsed]: Petition for Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error by Arthur C. Spencer and Charles E. Cochran, its attorneys, and says:

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause and

in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Eleven Thousand Three Hundred Eighty and Sixty-nine One-hundredths ($11,380.69) Dollars, with interest as in said judgment stated, and the further sum of Two Thousand ($2000.00) Dollars as attorney's fees in the District Court, and the further sum of One Thousand ($1000.00) Dollars attorney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the 5th day of June, 1922, in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint.

(b) Assignment of Error Number Seven charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates.

(c) Assignment of Error Number Eight wherein error is charged in overruling the objection to conclusion of law Number Two, in which the plaintiff in error, as defendant in the court below, was held liable to shippers on bills of lading and contracts of carriage and collection of charges during the time the vessels were requisitioned by and under Charter Two of the United States Shipping Board and all operations of said vessels were for account of said Shipping Board, between Oct. 20th and Dec. 28, 1917.

(d) Assignment of Error Number Nine, wherein error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect

between San Francisco and North Portland at the time said respective shipments moved.

(e) Assignment of Error Number Thirteen, wherein error was charged in holding and finding that Portland was a point intermediate to North Portland upon the line or route between San Francisco, California and North Portland, Oregon, over the line of The San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of the respective shipments.

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206c of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below, because

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against plaintiff in error.

WHEREFORE, the said The San Francisco and Portland Steamship Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States District Court, for the District of Oregon, as affirmed by the judgment of the United States Circuit Court of Appeals be reversed, annulled and esteemed for naught, and that said cause be remanded to the United States District Court for the District of Oregon with instructions to grant a new trial in said cause, and upon such trial to dismiss the complaint, and for such further proceedings in said cause as may be determined upon by our Supreme Court to the end that justice may be done in the premises.

A. C. SPENCER,
C. E. COCHRAN,
Attorneys for Plaintiff in Error.

[Endorsed]: Assignment of Errors on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Service by copy admitted Portland, Oregon, July 31st, 1922.

WILSON & GUTHRIE,
Attorneys for Deft. in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroads Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Order Allowing Writ of Error and Fixing Amount of Bond.

Based upon the petition of the plaintiff in error, together with certain assignments of error intended to be urged by him within due time,—

IT IS ORDERED that a writ of error issue upon said plaintiff in error filing a bond with the Clerk of this Court in the sum of Ten Thousand ($10,000.00) Dollars, said bond to operate as a supersedeas.

IT IS FURTHER ORDERED that the bond presented by the said petitioner be, and the same is hereby approved.

WM. H. HUNT,
U. S. Circuit Judge.

Dated, San Francisco, Cal., August 2, 1922.
Form O. K. G. B. G.

[Endorsed]: Order Allowing Writ of Error Returnable in Supreme Court U. S. and Fixing Amount of Bond. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, The San Francisco and Portland Steamship Company, as principal, and National Surety Company, as surety, are held and firmly bound unto A. J. Parrington, in the full and just sum of Fifteen Thousand ($15,000.00) Dollars to be paid to the

said A. J. Parrington, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 20th day of July, 1922.

WHEREAS, lately at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, in an action depending in said court, between The San Francisco and Portland Steamship Company, plaintiff in error, and A. J. Parrington, defendant in error, judgment was rendered against the said The San Francisco and Portland Steamship Company, and the said The San Francisco and Portland Steamship Company having obtained a writ of error and filed a copy thereof in the clerk's office of said United States Circuit Court of Appeals, to reverse the judgment in the aforesaid action, and a citation directed to the said A. J. Parrington citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the second day of October, 1922.

Now, the condition of the above obligation is such, that if the said The San Francisco and Portland Steamship Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above

obligation to be void; otherwise to remain in full force and virtue.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY.

By C. E. COCHRAN,
One of Its Attorneys.

[Seal] NATIONAL SURETY COMPANY OF NEW YORK.

By H. C. LEIGH,
Attorney in Fact.

Countersigned at Portland, Oregon, this 20th day of July, 1922.

D. E. GORTON,
Resident Agent.

Examined and approved this 2d day of August, 1922.

WM. H. HUNT,
Circuit Judge.

Service by copy admitted at Portland, Oregon, this 31st day of July, 1922.

WILSON & GUTHRIE,
Attorney for Defendant in Error.

Form and amount approved.

WILSON & GUTHRIE.

[Endorsed]: Bond on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-two (172) pages, numbered from and including 1 to and including 172, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on writ of error from the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the plaintiff in error, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon writ of error from

the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 29th day of August, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals befor you, or some of you, between The San Francisco and Portland Steamship Company, a corporation, plaintiff in error, and A. J. Parrington, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington,

D. C., within sixty days from the date hereof; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, 1922.

[Seal] F. D. MONCKTON,
Clerk of the Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Allowed by:

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 29th day of August, A. D. 1922.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Seal] By F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco & Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed Aug. 18, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to A. J. Parrington, Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the Supreme Court of the United

States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The San Francisco and Portland Steamship Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the Circuit Court of Appeals for the Ninth Circuit, this 18th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

WM. H. HUNT,
Judge, United States Circuit Court of Appeals for the Ninth Circuit.

Copy of writ served on us this 21st day of August, 1922.

JAMES G. WILSON,
Attorneys for Defendant in Error.

Service by copy admitted at Portland Oregon, August 21st, 1922.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 3800. In the Supreme Court of the United States. The San Francisco & Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. Filed Aug. 23, 1922. F. D Monckton, Clerk. By Paul P. O'Brien, Deputy.

FEB 16 1924

In the Supreme Court of the United States

OCTOBER TERM, 1923

No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR

ARTHUR C. SPENCER,
Pittock Block, Portland, Oregon,
Attorney for Plaintiff in Error.

JAMES G. WILSON,
Platt Building, Portland, Oregon,
Attorney for Defendant in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1923

No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR

In view of the filing by the Director General of Supplemental rather than Reply Briefs in Dockets 114 and 123, and because of the different construction placed upon the Fourth Section of the Act to Regulate Commerce by the learned counsel for the Director General than that entertained by the Plaintiff in Error herein, we would reply to the brief of Defendant in Error (hereinafter referred to as "plaintiff") in this cause.

THE DISTRICT COURT WAS WITHOUT JURISDICTION

The District Court's jurisdiction is asserted by the plaintiff upon the theory that no "administrative question depending upon facts to be ascertained from investigation" is presented.

Assuming, but not conceding that the rate to Portland was unlawful; it became necessary to establish one that was lawful. The rate to the more distant point might well be in a given case far in excess of or below a reasonable and lawful rate.

It so happens in this case that by reason of competition of lumber schooners returning northbound the rates were unduly low (Transcript 79 and 80). The establishment of a lawful rate to Portland might well necessitate "reconstituting the whole rate structure for many articles moving in an important section of the country."

> Keogh vs. Chicago & N. W. Ry. Co., 43 Sup. Ct. Rep. 47-50.

As before pointed out (page 32, opening brief), application to the shorter haul of the rate to the more distant point is not established as lawful by Section 4. Again, as is not improbable in this case, the rate to the more distant point might well be so far short of the line of reasonableness as to return substantially less than cost, casting a burden upon other traffic and constituting an unlawful preference to those using it.

Admission to the Court is not authorized by a determination by statute or by finding of the Commission of discrimination; same must be supplemented and attended by a lawful measure of compensation for the transportation service involved. The ascertainment of this measure, viz.: the reasonable, non-discriminatory rate, involves the exercise of administrative functions with which the Commission alone is clothed.

When thus ascertained the aggrieved party may recover, if the case warrants such action, *damages,* if any, caused by the alleged unlawful discrimination.

Penn. R. R. Co. vs. Int. Coal Co., 230 U. S. 184-202.

PLAINTIFF'S ASSIGNORS SUSTAINED NO INJURY BY THE PUBLICATION OF THE RATES TO NORTH PORTLAND AND HAVE PROVEN NO DAMAGE.

The complaint in this case sets forth the claims involved as *"overcharge"* claims. As was the case in International Coal Co., page 198, *supra,* no claim of damage is made, and there is neither allegation nor proof that injury was suffered. Nothwithstanding the distinction between overcharge and damage claims made in the Act and recognized by this Court, and in the face of the construction established, we think, by this Court in the International Coal Company case, that civil action on sections 2, 3 and 4 of the Act must be for damages resulting from injury sustained by reason

of prohibited discrimination practiced, no attempt has been made to comply with section 8 of the Act by proving these indispensable elements of injury and damage.

It will be asserted that the law will presume the rate to the more distant point, as applied to the intermediate point, to be reasonable and non-discriminatory.

On the contrary, Section 4 declares in substance that such presumption shall not be indulged. Furthermore, the history of the legislation and the operations of the carriers with respect to this section of the Act, demonstrate that rates to the more distant points were expected to be and have been below the level of reasonable rates and uniformly discriminatory.

The tendency of the carriers to make unduly low rates under this section to the more distant points to effectively compete with water carriers for tonnage destined to such points, thereby imposing, according to claims asserted, an undue burden upon other traffic, led to an amendment in 1910 that rates reduced to meet water competition should not be increased unless the Commission found that such proposed increase rested upon changed conditions other than the elimination of water competition, and to the 1920 amendment prohibiting rates to or from the more distant point *"not reasonably compensatory for the service performed."*

While Sections 2, 3 and 4 of the Act have for their purpose the prevention of unlawful discriminations and were considered as inter-related upon the enactment of the law as originally passed and in the administration of it since, yet Section 4 could not have been conceived as necessary for the protection of an individual shipper or group of shippers.

Ample protection for them was and is afforded by the *"all embracing"* provisions of the second and third sections of the Act (Intermountain Rate Cases, 234 U. S. 476-482).

The "generic provisions" of Sections 2 and 3 of the Act deal with voluntary acts of the carrier, while Section 4 recognizes conditions over which the carrier has no control, necessitating a rate for a longer haul less than the reasonable rate obtaining to a shorter distance point on the same line and route if the carrier is to participate in the business.

The matter as it obtained from the first was one of "public concern broader than the mere question of the duty of the carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate."

Intermountain Rate Cases, *supra*, 484.

While prior to the 1910 amendment the power to determine the lesser rate to the more distant point was lodged with the carrier, such determination was subject

"to the supervision and control of the Interstate Commerce Commission" and ultimately to judicial review. The amendment referred to "takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function."

The general public interest involved in the administration of Section 4 is reflected very clearly in the opinion of this Court in the Intermountain Cases *supra.* That it was not and is not the intent of the law to recognize as lawful, rates to the more distant point subversive of this public interest is made clear in East Tenn. etc., Ry. vs. Interstate Commerce Commission, 181 U. S. 1-20, wherein the Court suggests as *obviously* unlawful a rate which fails to yield the cost of the transportation.

That Congress did not intend Section 4 to be available to shippers as a basis upon which to prosecute "overcharge" claims is demonstrated by the following:

In its 33d Annual Report to Congress made December 1, 1919, the Interstate Commerce Commission at page 27 said:

> "An important question frequently arising is as to the right of complainants to reparation when higher rates are charged for shorter than for longer distances over the same line or route where the shorter is included within the longer distance, in violation of the fourth section.

"This question is considered in our reports in Iten Biscuit Co. v. Chicago, Burlington & Quincy Railroad Company. In our original report in that case, 50 I. C. C., 724, the rates charged were found to have been in violation of the long-and-short haul rule, but in the absence of proof of unreasonableness and damage, reparation was denied and the complaint dismissed.

"Upon complainant's petition the case was reopened for further consideration. In our report, 53 I. C. C. 729, the original findings were affirmed. We stated, following the decision of the United States Supreme Court in Pennsylvania Railroad Co. vs. International Coal Co., 230 U. S. 184:

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable per se and the lower rate too low. In such a case

the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and consequent damage. In this instance, as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pacific Co. v. Darnell-Taenzer Co., *supra,* may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the court was 'whether the fact that the plaintiffs were able to pass on the damage sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under Sections 2 and 3 there must be proof of damage and under Section 4 the departure therefrom is of itself proof of damage."

After its attention had been thus called to the construction the Commission was placing upon Section 4, and with full knowledge of the manner in which the same was being applied and administered, Congress by Act approved February 28, 1920, in amending Section 4 made no change with respect to the provision here involved.

41 U. S. Statutes at Large, page 480.

It appearing from the testimony of the plaintiff himself (page 73, Transcript) that the packing house at North Portland did not buy sugar to sell it to the trade, and that no business was conducted there in competition with his assignor merchants, damages resulting from the operations of the packing house people (Swift & Company) would be improbable and certainly should not be assumed irrespective of whether the sugar consumed by them was delivered by boat at their wharf at North Portland or purchased by them at Portland or elsewhere.

THE PORT-TO-PORT OPERATIONS OF THE STEAMSHIP COMPANY WERE NOT SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE, AND THE GOVERNMENT WAS NOT RESTRAINED BY THE PROVISIONS OF THE CANAL ACT OR THE COMMERCE ACT IN THE OPERATION OF THE SHIPS OF THE STEAMSHIP COMPANY WHICH WERE REQUISITIONED BY THE UNITED STATES SHIPPING BOARD, EFFECTIVE OCTOBER 15, 1917.

In our opening brief, at page 18 et seq., we have discussed the Panama Canal Act in its relation to the operations of the Steamship Company, in view of the

mandate contained in Section 15 of the Commerce Act, wherein jurisdiction is denied the Commission with respect to transportation conducted wholly by water, and notwithstanding the fact that the Oregon-Washington Railroad & Navigation Company (the parent company of the plaintiff in error) owns or operates no line of railroad south from Portland, we deem it unnecessary to discuss the question as to whether or not the consent of the Commission was an essential prerequisite to the continued operation of the steamship line from and subsequent to July 1, 1914.

We do submit, however, that when under the Emergency Shipping Fund provision of the Urgent Deficiency Appropriation Act of June 15, 1917, the President requisitioned the ships of this steamship company, the act was a soverign one, and the possession and control taken and assumed was attended with all of the attributes of sovereignty.

From the effective date of the Government's requisition, the corporate possession and control of the steamship company ceased and became an agency control and possession for the Government. From that moment the Government could operate the ships through its Canal or upon the route of the steamship company, or elsewhere as the emergencies of the changing situation required.

Enveloped in a condition requiring such summary action by the Government, it is inconceivable that the

operations of the ships were subject to the restraining provisions of Section 4 of the Commerce Act, or to any regulation or order of the Commission whatsoever. Shipping contracts made on and after October 15, 1917, and until May 29, 1918, in the name of the steamship company were and are contracts of the Shipping Board for account of the Government, and the incident of billing was and is immaterial.

Director General vs. Zirkle, 138 N. E. (Ind.) 266.

Louisiana v. Tex. & Pac. Ry., 229 U. S. 336-341.

Missouri Pac. R. R. Co. v. Ault, 256 U. S. 554.

It cannot be that the steamship company is exposed to actions of this kind by shippers or their assignees on agency transactions conducted for the Government and closed years since.

We note on page 29 of the brief of defendant in error reference to "*certain of the boats* on which part of the sugar was handled were under requisition," etc. It is difficult to understand why this expression. The steamers "Rose City" and "Beaver" were the only ships owned or operated during the period in question and until the charter by the Director General of the steamship "Blandon," pursuant to authority of Mr. C. R. Gray, Director of the Division of Operation, United States Railroad Administration. (Page 96, Transcript.)

We think the statement of this fact is amply confirmed by the record, and in this connection quote from page 99 of the Transcript:

"Mr. Wilson: The 'Rose City' and 'Beaver' continued to operate between San Francisco and Portland during this entire period?

"Mr. Cochran: Yes; there was no cessation of the movement of the boats.

"Mr. Wilson: And they continued to handle shipments tendered to the agent at San Francisco, the same as before that time?

"Mr. Cochran: Yes, they did just as the telegram, this Exhibit 'B' said to do, namely, to operate their regular trades—operate in their regular trades, *and the company did continue the operation of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.*"

THE WORD "CHARGE," AS USED IN SUBDIVISION 1 OF SECTION 4 OF THE COMMERCE ACT CONVEYS THE IDEA OF OBLIGATION, AND THE ACT DOES NOT CONTEMPLATE THAT ANY OBLIGATION CAN BE IMPOSED UPON THE SHIPPER OR CONSIGNEE, OR ASSERTED BY THE CARRIER UNTIL A TRANSPORTATION SERVICE IS PERFORMED.

In view of what has been said on this question (page 59 et seq.) in our opening brief and the exhaustive discussion of the counsel for the Director General in his supplemental brief in Cases 114 and 123, we will not

attempt to pursue the subject further than to say that if an indictment were presented against a carrier for concurring in a joint tariff prepared and filed by another and connecting carrier publishing a paper rate over a joint route, the originating carrier having published and used a higher rate for transportation of the same commodity to an intermediate point on its own line, it is inconceivable that conviction would be permitted or sustained upon a record showing no transportation performed upon the joint route, no shipments offered to the destination upon the connecting carrier, and no obligation claimed or asserted.

OPINION IN UNITED STATES VS. LOUISVILLE & NASHVILLE CO., 235 U. S. 314, DID NOT INTEND TO MODIFY OR MAKE OR RECOGNIZE ANY EXCEPTIONS TO THE MANDATORY PROVISIONS OF SECTION 6 OF THE ACT REQUIRING THE CARRIER TO CHARGE AND COLLECT ITS PUBLISHED RATES.

This Louisville & Nashville case has been cited repeatedly by counsel for defendant in error to sustain his contention that the Steamship Company having failed to obtain authority from the Commission for the higher local rate to Portland than the lower joint rate to North Portland, the local rate ceased to exist or did not exist at all because of the 1910 amendment to Section 4 of the Act, taking from the carrier "the right in the first instance to decide the relativity of such rates."

Commercial houses at Atlanta and other Georgia cities, complained of undue preference and advantage

accorded by the carriers to Nashville, Tenn., in that rebilling or reshipping privileges were granted to Nashville dealers. Grain, grain products and hay from Ohio and Mississippi River crossings were shipped into Nashville and there unloaded and when later shipped to the southeast, settlements were made on basis of through rate from originating point through Nashville to point of destination, the adjustment being accomplished in the claim department of the Railroad Company where the shipper was paid an amount equal to the difference between the through rate and the sum of the locals. This practice was condemned by the Commission as a violation of Section 3 of the Act (16 I. C. C. 590; 21 I. C. C. 186), and it is difficult, without having access to the record before the Commission, to find wherein a violation of Section 4 of the Act could have been involved. But assuming, as we consider that we are bound to do, that Section 4 was involved, it is in our opinion immaterial upon the question we are discussing.

The parties interested by proceeding in the Commerce Court, enjoined the order of the Interstate Commerce Commission and this court in reviewing the action of the Commerce Court had for its determination the one question "as to the legality of the reshipping privilege permitted at Nashville by the carriers." This court found that the Commerce Court exceeded its jurisdiction, and that, notwithstanding its recital that the evidence was undisputed, "the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most

fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." The Chief Justice then reasons to the conclusion that if the rebilling privilege was, when originally established, an exertion of the authority conferred or recognized by Section 4 of the Act "it followed that its continued operation was manifestly *unlawful* and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below." The court then determines that the rebilling privilege in question was "controlled by Section 4 of the Act." So, it appears that this court sustained the Interstate Commerce Commission in condemning the rebilling privilege and finds that the rates resulting from the practice were unlawful and in violation of Section 4 of the Act.

It is true that preliminary to the ultimate decision of the case the Chief Justice makes the statement so zealously clung to by counsel for the plaintiff that *"it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted."* But the quoted statement is merely inducement to and merged in the ultimate finding of the unlawful character of the practice condemned. It is unreasonable to attribute to it more force than that attributable to the final conclusion.

That a rate complained of might have been unlawful at and from the time it was published may be con-

ceded, and yet the carrier required and compelled to collect it as the only legal rate, is established by such an unbroken line of authority that it seems to us unreasonable to attach the importance claimed by counsel for plaintiff to the expression of the Chief Justice in the Louisville & Nashville case quoted by him.

It is but fair to consider in reading the opinion and considering the quoted expression to follow the pronouncement of this court in East Tennessee, etc., Railway Co. vs. I. C. C., *supra,* page 17:

> "The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided."

THE TWO-YEAR LIMITATION PERIOD.

In his earnest argument to be relieved from the consequences that must follow from the decisions of this Court in Phillips vs. Grand Trunk Western Railway, 236 U. S. 662, and Kansas City Southern vs. Wolff, et al, 43 S. C. R. 259, counsel discusses the two-year period prescribed by the Commerce Act as the time within which complaints for the recovery of damages must be filed as directed against the remedy. In this we think he errs.

The claims involved in this case certainly could not be successfully asserted at common law if the rates actually paid were in and of themselves reasonable.

Cowden vs. Pacific Coast SS. Co., 94 Calif. 470.

Plaintiff has therefore of necessity predicated his case upon the Interstate Commerce Act, and such rights as he may have are extended and circumscribed by that Act.

In Eberhart vs. U. S., 204 Fed. 884, at page 890, Judge Sanborn, in his concurring opinion, says:

> "An Act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates (The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; Pollard v. Bailey, 20 Wall. 520, 526, 527, 22 L. Ed. 376; Bank v. Francklyn, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; Boyd v. Clark (C. C.) 8 Fed. 849; Brunswick Terminal Co. v. National Bank of Baltimore, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26), because such limitations are conditions of the liability itself and not limitations of the remedy only. They are excepted from the rule announced in Campbell v. Holt, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common-law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the Legislature may not overthrow at pleasure by extending the time for collecting it."

When Congress enacted the provisions against discrimination involved in this act, and further provided in the same act that a party aggrieved by reason of the violation of said provisions prohibiting discrimination could recover damages upon condition that he file his complaint within two years from the time the cause of action accrued *and not after,* a compliance with the condition imposed by the enactment became indispensable to recovery. In other words, it is not a limitation statute at all in the sense in which that expression is ordinarily used. This limitation relates not merely to the remedy but to the right of action.

Seaboard Air Line v. Renn, 241 U. S. 290.

Atlantic Coast Line v. Burnette, 239 U. S. 199.

In other words, there has been a jurisdictional failure on the part of the plaintiff, and no plea upon the part of the defendant was or is necessary to avail itself of plaintiff's omission.

It may be urged that the claims involved are restored and reinstated by virtue of Section 206, subparagraph (f) of the Transportation Act (41 Statutes at Large, 461-462), reading as follows:

> "(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control."

We respectfully submit that this provision cannot so operate. Claims of the plaintiff expired with the two-year period. After that date the moneys collected by the steamship company became its absolute property, and to refund it or any part of it would amount to a rebate. The ownership of this personal property by the steamship company is entirely analogous to the ownership acquired by prescription creating a title to real estate, which title cannot be divested upon proceedings prosecuted by authority of a limitation statute enacted after the prescriptive rights had matured and culminated in ownership.

Campbell v. Holt, 115 U. S. 620.

The debt having become entirely extinguished, the same could not operate "as a consideration for a new assumpsit." In the case of the ordinary general limitation statute, the mere lapse of time does not operate to destroy the right or extinguish the debt, but simply deprives the creditor of the means of enforcing his claim against the wishes of the debtor. The prescribed period may run, and later the Congress or legislature enact a statute rendering available a remedy to enforce the existing right, and on the authority of the Campbell case *supra* such statute is valid, no taking of property being involved but merely a depriving one of his defense, which right of defense does not amount to a vested property right. To permit a recovery on claims that had become extinguished prior to the enactment of

the Transportation Act under the authority of subparagraph (f) of Section 206 would be to violate the Fifth Amendment and would constitute a taking of the property of the Steamship Company without due process of law.

We forego further discussion of the case, but upon the Errors Assigned and returned with the writ herein, which Assignments of Error are for convenient reference appended hereto, and upon the points urged in our opening brief and herein in the consideration thereof, respectfully submit that the judgment of the Circuit Court of Appeals should be reversed.

ARTHUR C. SPENCER,
Attorney for Plaintiff in Error.

ERRORS ASSIGNED AND RETURNED WITH THE WRIT HEREIN

(Page 164 et seq., Transcript)

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause and in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to-wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Eleven Thousand Three Hundred Eighty and Sixty-nine One-hundredths ($11,380.69) Dollars, with interest as in said judgment stated, and the further sum of Two Thousand ($2,000.00) Dollars as attorney's fees in the District Court, and the further sum of One Thousand ($1,000.00) Dollars attorney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the 5th day of June, 1922, in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in

favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to-wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint. (The demurrer is found at page 21 of the transcript and challenges the complaint on the following grounds: (1) That the court was without jurisdiction on the subject matter of the action; (2) that the complaint did not state facts sufficient to constitute a cause of action; and (3) that the action on claims arising prior to January 1, 1918, was not commenced within the time limited by the Interstate Commerce Act nor within the time limited by the 1920 Oregon Laws.)

(b) Assignment of Error Number Seven charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in

failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates. (Page 121 of Transcript.)

(c) Assignment of Error Number Eight wherein error is charged in overruling the objection to conclusion of law Number Two, in which the plaintiff in error, as defendant in the court below, was held liable to shippers on bills of lading and contracts of carriage and collection of charges during the time the vessels were requisitioned by and under Charter Two of the United States Shipping Board and all operations of said vessels were for account of said Shipping Board, between October 20th and December 28, 1917. (Page 122 of Transcript.)

(d) Assignment of Error Number Nine, wherein error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved. (Page 122, Transcript.)

(e) Assignment of Error Number Thirteen, wherein error was charged in holding and finding that Portland was a point intermediate to North Portland upon the line or route between San Francisco, California, and North Portland, Oregon, over the line of The San Francisco and Portland Steamship Company and the

Oregon-Washington Railroad & Navigation Company at the time of the movement of the respective shipments. (Page 123, Transcript.)

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206c of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below, because

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against plaintiff in error.

FEB 25 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 122.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, *Plaintiff in Error.*

vs.

A. J. PARRINGTON, *Defendant in Error.*

No. 123.

JAMES C. DAVIS, AGENT, UNITED STATES RAILROAD ADMINISTRATION, *Plaintiff in Error,*

vs.

A. J. PARRINGTON, *Defendant in Error.*

MOTION OF DEFENDANT IN ERROR.

For an Order to Reconsider the Rule Announced in Kansas City Southern vs. Wolf, 43 S. C. R. 259, With Reference to the Limitation of Actions in View of Subsequent Legislation of Congress and to Receive and Consider the Accompanying Argument on Said Reconsideration.

JAMES G. WILSON,
Attorney for Defendant in Error,
508 Platt Building, Portland, Oregon.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION.

Comes now the defendant in error in the above-entitled cases and moves the Court under its rule announced by the Honorable Chief Justice at the argument of the above-entitled causes (to wit: that the Court will not permit or receive argument for reconsideration of a rule announced in a decided case without special leave of Court), that the Court grant such leave and reconsider the rule as announced in case of Kansas City Southern vs. Wolf, 43 S. C. R. 259, on the question of limitation of actions arising under the Act to Regulate Commerce, in view of the legislation of Congress enacted subsequently to the facts in said Wolf case, and that the Court receive and consider the accompanying argument on such reconsideration.

THE FACTS.

The facts on which this motion is based are:

1. That the rule as to the limitation of actions on claims which may be sued on in Court without prior submission to the Interstate Commerce Commission as announced in Kansas City Southern vs. Wolf is based not upon any limitation prescribed by the Act to Regulate Commerce as to actions commenced primarily in court, the Act in that record being silent, but upon the fact that said Act at the time the claims in said Wolf case arose prescribed a limitation of two (2) years within which proceedings before the Interstate Commerce Commission on claims for reparation could be filed and that the rule of uniformity in the administration of said Act required the same limitation period to be applied to the commencement of actions in Court.

2. That in and by Sec. 206(a) of the Transportation Act of 1920, enacted by Congress subsequently to the facts giving rise to the claims in the Wolf case, it is provided

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character as prior to Federal Control could have been brought against such carrier, may, after the termination of Federal Control be brought against an agent designated by the President for such purpose. * * * Such actions * * * may within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal Control would have had jurisdiction of the cause of action, had it arisen against such carrier."

And in and by Sec. 206(c) of the Transportation Act of 1920 it is provided

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal Control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal Control against the agent designated by the President. * * *"

and that in and by Sec. 206(f) of said Transportation Act it is provided

> "The period of Federal Control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal Control."

and in and by the amendment to Sec. 16 of the Interstate Commerce Act as enacted in the Transportation Act of 1920, it is provided

> "All actions at law by carriers subject to this Act for recovery of their charges or any part thereof, shall be begun within three years from the time the cause of action accrues and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall for the purposes of this section be deemed to accrue on delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District Court or State Court within one year from the date of the order, and not after."

3. The complaints in these two causes were filed in the District Court of the United States on the 12th day of February, 1921, within one year after the pas-

sage of the Transportation Act of 1920, which Act was passed February 28, 1920. The rule of limitations prescribed in the Wolf case should be modified in the present case in view of this additional legislation. The defendant in error asks a reconsideration of the rule announced in the Wolf case, and respectfully requests that the argument hereinafter submitted be filed and considered by this Court and the proper rule of limitation be applied in the pending cases.

Respectfully submitted,

JAMES G. WILSON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

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ARGUMENT.

On the Question of Limitation Submitted with Motion for Leave to Reconsider the Rule of Limitation Announced in Kansas City Southern vs. Wolf.

On the argument in the above-entitled causes the Court refused to permit argument on the question of the limitation of actions on claims arising under the Act to Regulate Commerce, commenced primarily in the courts. This refusal was due in part perhaps to the ignorance of the attorney of defendant in error of the rule and his misconception of it when the same was announced by the Chief Justice at the argument, for we apprehend that the Court would have permitted the argument in view of the legislation of Congress of 1920, with reference to the statute of limitations apply-

ing to the pending actions and not applying to the claims in the Wolf case. In other words, that counsel would have been permitted to call attention to the subsequent legislation of Congress bearing upon the present cases which, in fact, constitute a differentiation of the Wolf case.

At the time of the accruing of the claims in the Wolf case, to wit, 1913, Sec. 16 of the Act to Regulate Commerce simply prescribed a period of two years within which proceedings before the Interstate Commerce Commission for recovery of reparation should be commenced. That section, and in fact, the whole act was entirely silent upon the limitation of actions in court for the recovery of damages under Secs. 8 and 9 of the Act. The decision in the Wolf case limiting the period of commencement of actions in court to two years, was based on the principle of uniformity in the administration of the Interstate Commerce Act, and adopted under that principle the period limited by the Act for proceedings before the Commission. The Transportation Act of 1920 had no bearing on the claims in the Wolf case and was not considered in that case. The Transportation Act does, however, have a material bearing on the period of limitation of claims in the present cases. The present actions were commenced on February 12, 1921, less than one year after the passage of the Transportation Act of 1920, in and by Sec. 206(a) of which it is provided:

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character as prior to Federal

> Control could have been brought against such carrier may after the termination of Federal Control be brought against an agent designated by the President for such purpose. * * * Such actions, suits, or proceedings may *within the periods of limitation now prescribed by State or Federal statutes,* but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal Control, would have had jurisdiction of the cause of action had it arisen against such carrier."

There is no Federal statutory period of limitation prescribed for the commencement of actions in court under Secs. 8 and 9 of the Act to Regulate Commerce. The only statutory period as referred to in the last-above quoted section would therefore be the State statute of limitations of Oregon, which is six years, and this we submit should be applied subject to the further limitation in the section just quoted requiring actions of such character to be commenced within two years from the date of the passage of the Act.

So far as the claims sued on Cause No. 123 are concerned, the action would be in time as to all claims under this statute, which applies to all actions arising during the period of Federal Control.

If, however, the principle of uniformity announced in the Wolf case obtains, notwithstanding the above-quoted sections of the Transportation Act, still the action as to all claims during the period of Federal Control was commenced in time, for the Transportation Act contains a definite period of limitation as to claims before the Commission. Section 206(c) of the Transportation Act prescribes the limitation for all claims during the period of Federal Control, as follows:

> "Complainants praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal Control of rates, fares, charges, classifications, regulations or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal Control against the agent designated by the President * * *."

Therefore, whether the limitation specifically designated as to actions in court under Sec. 206(a) is applied, or whether under the rule of uniformity the limitation prescribed for proceeding before the Commission under Sec. 206(c) is applied, the action as to all claims against the Director General was in time, and therefore there should be no diminution of the judgment against the Director General on account of the statute of limitations.

We deem it further pertinent to call the Court's attention to the fact that no question of the statute of limitations in either of the lower courts was ever raised as to case against the Director General. The Director General did not consider that the statute of limitations had run as to any of the claims in that case, and the lower court did not pass upon any such question. Indeed, no thought of any such question ever arose until the decision of this Court in the Wolf case, when the principle there announced was attempted to be engrafted into the record.

As to the claims in Cause No. 122, the question was

raised as to the limitation of all claims prior to January 1, 1918, not on the basis of the limitation prescribed for proceeding before the Commission, but on the basis of a statute of the State of Oregon, which it was claimed applied, but even as to claims in this case, the legislation of 1920 applies, for in and by Sec. 206(f) of the Transportation Act it is provided:

> "The period of Federal Control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal Control."

The Transportation Act was passed February 28, 1920. The actions having been commenced on February 12, 1921, were fourteen days within one year from the passage of the Act. The period of Federal Control commenced at noon on December 28, 1917, and extended to and included February 29, 1920, so that the period of one year and fifteen days prior to Federal Control was still within the two-year period of limitation, eliminating, as the statute provides, the period of Federal Control, which would bring all claims arising on or after December 13, 1916, within the period of limitation, and hence there would be eliminated on this basis of figuring only those claims arising between May 10, 1916, and December 13, 1916. But we submit that by the amendment of Sec. 16 of the Interstate Commerce Act by the Transportation Act of 1920 the period of limitation under the rule of uniformity of administration should be extended to a period of three years and ninety days at least. This amendment of Sec. 16 reads as follows:

> "All actions at law by carriers subject to this Act for recovery of their charges or any part thereof

shall be begun within three years from the time the cause of action accrued, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, *unless the carrier after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun.*

"In either case, the cause of action in respect of a shipment of property shall for the purposes of this section be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District court or State court within one year from the date of the order, and not after."

The amendment of this section by the Transportation Act of 1920 extended the possible time for proceedings before the Commission to a period of three years and ninety days, depending upon the time within which a carrier might commence an action against a shipper. On the principle of uniformity of administration, therefore, the period of limitation for actions in Court should be similarly extended, and therefore instead of a two years period of limitation as held in the Wolf case, we submit that the limit for actions in court should not be restricted to a period of less than three years and ninety days, the longest period that any shipper can commence a proceeding before the Commission, as the Court can readily see that otherwise a carrier might extend the period for applying to the Commission for some shippers by commencing actions against them,

whereas other shippers similarly situated but who were not sued would be deprived of their remedy and thus the two-year period of limitation prescribed by the Court would become a means of discrimination instead of a rule of uniform application of the Act. Likewise, if this extended period of limitation before the Commission is to obtain as prescribed by the statute, then on the principle of uniformity the same period should be open to the shipper to make any such defense in the courts in case he is sued by the carrier. For if the period of limitation before the Commission is to be applied in the courts in one case it should be applied in the courts in all cases. But this idea is contrary to the contention of counsel for the Director General, for he stated that after the two years' period of limitation had expired a shipper who had been sued could not in fact make any counterclaim on account of the shipments moving more than two years prior to the commencement of the action by the carrier. It will readily be seen that unless the longest period in which any shipper may apply to the Commission is applied as the period of limitation to actions in court that the principle announced in the Wolf case will become the means of very great lack of uniformity in the administration of the law and that these elements have arisen by reason of the legislation of Congress subsequent to the accrual of the claims in the Wolf case, and the rule announced in the Wolf case should therefore be reconsidered to harmonize the rule with the later legislation.

In view of these subsequent acts of Congress and their varying and elastic periods of limitations, and the fact that there is no specific statutory limitation prescribed in the Act as to actions in court, is not the necessity for the uniformity in the period of limita-

tion eliminated entirely and should not the principle which had always obtained that where no period of limitation has been prescribed in the Federal statute that the statute of limitation prescribed by the State law obtains; and should not therefore the Court hold in view of this later legislation that the proper period of limitation of such actions in court now and since the Transportation Act of 1920, as the period of limitation prescribed by the State statute which in this case is six years?

But whether the Court in the reconsideration of this question concludes that the stated statutes shall apply or that the period of three years and ninety days applies, or that the two year period applies, yet as heretofore pointed out the limitation in any event in view of the Transportation Act of 1920 will not reduce the amount of recovery at all in cause No. 123 and will reduce the claims in cause No. 122 only in the event that the two year period still obtains, and that period by elimination of the period of Federal Control will apply only to those shipments moving prior to December 13, 1916, and to no others.

Respectfully submitted,

JAMES G. WILSON,
Attorney for Defendant in Error.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 123

JAMES C. DAVIS, AGENT UNITED STATES RAILROAD ADMINISTRATION, PLAINTIFF IN ERROR,

vs.

A. J. PARRINGTON

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED SEPTEMBER 14, 1922

(29,145)

(29,145)

SUPREME COURT OF THE UNITED STATES

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Names and Addresses of Attorneys of Record.

ARTHUR C. SPENCER, JOHN F. REILLY, and CHARLES E. COCHRAN, Wells Fargo Building, Portland, Oregon,

For the Plaintiff in Error.

WILSON & GUTHRIE, Platt Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To A. J. Parrington, GREETING:

You are hereby cited and admonished to be and appear before the UNITED STATES CIRCUIT COURT OF APPEALS for the NINTH CIRCUIT, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the DISTRICT COURT OF THE UNITED STATES for the DISTRICT OF OREGON, wherein James C. Davis, Agent, United States Railroad Administration is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of September, in the year of our

Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,
Judge. [1*]

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 28th day of September, 1921.

JAMES WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 8747. United States District Court, District of Oregon. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Sep. 28, 1921. By G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in

*Page-number appearing at foot of page of original certified Transcript of Record.

the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Nonorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of September, 1921.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon. [2]

The foregoing writ of error was duly served upon

the District Court of the United States for the District of Oregon, by filing a copy thereof with me as the clerk of said Court on this 28th day of September, 1921.

G. H. MARSH,
Clerk, United States District Court, District of Oregon.

[Endorsed]: No. L.—8747-27-192. In the U. S. Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed September 28, 1921. G. H. Marsh, Clerk, United States District Court, Clerk. District of Oregon.

In the District Court of the United States for the District of Oregon.

November Term, 1920.

BE IT REMEMBERED, that on the 12th day of February, 1921 there was duly filed in the District Court of the United States for the District of Oregon a complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

AT LAW.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Complaint.

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the San Francisco & Portland Steamship Company is now and during all the times hereinafter complained of was a corporation organized and existing under and by virtue of the laws of the State of Utah, and was the owner of the line of steamboats and steamships operating between San Francisco, in the State of California, and Portland, in the State of Oregon.

II.

That from midnight of December 28, 1917, to midnight of February 29, 1920, the United States Railroad Administration was in control of said line of steamboats and steamships between San Francisco and Portland of the San Francisco & Portland Steamship Company, and was operating the same as

common carrier in interstate commerce under the authority of the United States and the Director General of Railroads, and pursuant to its tariff, rules, and regulations for said purpose adopted and provided; that pursuant to the act of Congress and his appointment by the President of the United States, defendant John Barton Payne is now the duly appointed, qualified, and acting agent of said United States Railroad [4] Administration and authorized to represent it in the defense of this action.

III.

That the Oregon-Washington Railroad & Navigation Company pursuant to section 5 of the act of Congress known as "The act to Regulate Commerce," as amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock in the San Francisco & Portland Steamship Company for permission to continue the ownership and control and to continue the operation of the line of steamships and steamboats of the said San Francisco & Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, which said permission was granted, and thereafter said San Francisco & Portland Steamship Company in reference to the operation of its steamships and steamboats on the line or route between San Francisco and Portland has been

at all times subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as the railroad controlling said water carrier.

IV.

That heretofore and prior to the taking control of said line of steamboats and steamships by the said United States Railroad Administration, said San Francisco & Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company filed with the Interstate Commerce Commission a schedule of rates contained in Oregon-Washington [5] Railroad & Navigation Company's tariff No. 131-A, Interstate Commerce Commission No. 384 and supplements thereto, and published the same, which said schedule of rates became effective prior to December 28, 1917; that the rates so established by said schedule over the line of steamboats or steamships of defendant on the line or route from San Francisco, California, to Portland, Oregon, thence via the line of the railroad of the Oregon-Washington Railroad & Navigation Company to North Portland, in the State of Oregon, on sugar in carload lots of the minimum weight of thirty thousand (30,000) pounds was and is twelve and one-half (12½) cents per hundred pounds; that said rate was continued in force and effect by the United States Railroad Administration up to and inclusive of June 24, 1918; that pursuant to General Order No. 28 of United States Director General of Railroads, there was filed with the Interstate Commerce Commission and published

by said Director General of Railroads then operating said line of the San Francisco & Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company over the line or route above alleged, Special Supplement No. 14 to said above-named tariff, which said supplement became effective June 25, 1918, and established a rate of fifteen and one-half (15½) cents per hundred pounds on shipments of sugar in carload lots of the minimum weight of thirty thousand (30,000) pounds from San Francisco, California, to North Portland, Oregon, which said rate continued in force and effect and was the lawfully established rate for shipments of sugar in said carload lots up to and inclusive of the 29th day of February, 1920. [6]

V.

That during all of said times the United States Railroad Administration on all shipments of sugar in carload lots over said line or route from San Francisco to Portland was charging a greater rate for the distribution thereof via the said steamboat and steamship line from San Francisco to Portland than was charged by it over the same route for the shipment of sugar from San Francisco to North Portland, said haul from San Francisco to Portland being included within the distance of San Francisco to North Portland; that on all shipments of sugar hereinafter specified carried by the said United States Railroad Administration from San Francisco to Portland via the steamboat and steamship line of the San Francisco Steamship Company from and including the 29th day of December, 1917, up to and

inclusive of the 24th day of June, 1918, the said United States Railroad Administration charged and collected the sum of fifteen (15) cents per hundred pounds in carload lots from San Francisco to Portland, and on all said shipments of sugar hereinafter specified shipped on and after the 25th day of June, 1918, up to and inclusive of the 29th day of February, 1920, said United States Railroad Administration charged and collected the sum of nineteen (19) cents per hundred pounds.

VI.

That on all such shipments said United States Railroad Administration exacted and charged as war tax at the rate of 3% of charges collected, and that such charges were to the extent that the same exceeded the rate established and in effect from San Francisco to North Portland at the same time illegal and unlawful and charged without authority of law, and the exaction of a war tax on the excess of such charges over said rate from San Francisco to North Portland was illegal and unlawful and [7] exacted without the authority of law and in violation of section 4 of the act of Congress known as "The Act to Regulate Commerce" and amendments thereto.

VII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Kerr Brothers, a number of carloads

of sugar on the date and of the weight shown in Exhibit "A" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of 3% thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Kerr Brothers, a number of carloads of sugar on the date and of the weight shown in Exhibit "B" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Kerr Brothers; and that said Wadhams & Kerr Brothers have heretofore for a valuable consideration, sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified. [8]

VIII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, con-

signed to Mason, Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "C" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Mason, Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "D" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Mason, Ehrman & Company; and that said Mason, Ehrman & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

IX.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland [9] Steamship

Company over the route hereinabove specified, consigned to Wadhams & Company, a number of carloads of sugar, on the date and of the weight shown in Exhibit "E" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "F" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Company; and that said Wadhams & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

X.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of

the San Francisco & Portland Steamship Company, over the route hereinabove specified, consigned to T. W. Jenkins & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "G" attached hereto and made a part of this complaint, on all of which defendant [10] received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to T. W. Jenkins & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "H" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by T. W. Jenkins & Company; and that said T. W. Jenkins & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XI.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from

San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "I" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war-tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, [11] Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number or carloads of sugar on the date and of the weight shown in Exhibit "J" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Lang & Company; and that Lang & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XII.

That between the 29th day of December, 1917,

and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Olds, Wortman & King, a number of carloads of sugar on the date and of the weight shown in Exhibit "N" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Olds, Wortman & King, a number of carloads of [12] sugar on the date and of the weight shown in Exhibit "O" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Olds, Wortman & King; and that said Olds, Wortman & King have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XIII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Pacific Coast Biscuit Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "P" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Pacific Coast Biscuit Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "Q" attached hereto and made a part of this complaint, on all of which defendant [13] received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Pacific Coast Biscuit Company; and that said Pacific Coast Biscuit Company has heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against

the defendant on all shipments shipped between the dates above specified.

XIV.

That Astoria is on the route of said Steamship Company between San Francisco and Portland, and between San Francisco and North Portland, and the rates on sugar, carload lots, from San Francisco to Astoria are the same as from San Francisco to Portland; that between the 29th day of December 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Astoria via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "K" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "L" attached hereto and made a part of this [14] complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph

enumerated on the shipments listed were paid by Lang & Company; and that said Lang & Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XV.

That between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Ross Higgins, Mason Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "M" attached hereto and made a part of complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Ross Higgins, Mason Ehrman, Company; and that said Ross Higgins, Mason Ehrman Company has heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and *excess* war tax and claim against the defendant on all shipments shipped between the dates above specified.

XVI.

That all of said charges were paid by the respective consignees in the exhibits attached hereto on the re-

spective [15] dates shown in the column "Date Paid," that the overcharges on each and all of said shipments are designated in the column headed "Overcharges," that all of said overcharges were illegally exacted and exacted contrary to the provisions of section 4 of the act of Congress known as the Act to Regulate Commerce, and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments, and the defendant is indebted to the plaintiff in the full sum of said overcharges, to wit, the sum of six thousand sixty-two and 77/100 dollars ($6,062.77), together with interest at the rate of 6% per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest.

XVII.

That the sum of fifteen hundred dollars ($1500.00) is the reasonable sum to be allowed the plaintiff as attorney's or counsel's fees herein.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of six thousand sixty-two and 77/100 dollars ($6,062.77), together with interest on the respective overcharges from the date of payment thereof, and for the further sum of fifteen hundred dollars ($1500.00) as attorney's or counsel's fees, and for costs and disbursements incurred herein.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, A. J. Parrington, being first duly sworn, on my oath depose and say that I am the plaintiff [16] above named, that I have read the foregoing complaint, know the facts therein stated, and that the same are true as I verily believe.

A. J. PARRINGTON.

Subscribed and sworn to before me this 12th day of February, 1921.

[Seal] JAMES G. WILSON.
Notary Public for Oregon.

My commission expires September 26, 1924. [17]

AND AFTERWARDS, to wit, on the 8th day of March, 1921, there was duly filed in said court a demurrer to the complaint, in words and figures as follows, to wit: [35]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint on file herein on the ground

I.

That the Court has no jurisdiction of the subject matter of the action.

Defendant will rely in presenting this demurrer on the proposition that the Intestate Commerce Commission has exclusive original jurisdiction of controversies of this character.

JOHN F. REILLY,
A. C. SPENCER,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JOHN F. REILLY.

Service by copy admitted at Portland, Oregon, March 8, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed March 8, 1921. G. H. Marsh, Clerk. [36]

AND AFTERWARDS, to wit, on the 4th day of April, 1921, there was duly filed in said court, an opinion on demurrer to the complaint, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

L.–8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

L.–8723.

THE PORTLAND SEED COMPANY, a Corporation,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Company),

Defendants.

Opinion on Demurrer to Complaint.

Portland, Oregon, April 4, 1921.

MEMORANDUM by BEAN, District Judge:

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points. [38]

The third case is a similar action against the Director General of Railroads, covering a shipment of

alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportion to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the court is without jurisdiction of the subject matter because exclusive original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for a violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of like kind of property for a shorter than a longer distance over the same line or [39] route,

in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeal in S. P. vs. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: one where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation in which case the Commission has original jurisdiction. (Texas & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. vs. U. S., 215 U. S. 481; Robinson vs. B. & O., 222 U. S. 506; Mitchell Coal vs. Penn. R. R., 230 U. S. 247; Morrisdale Coal vs. Penn. R. R., 230 U. S. 304; Tex. & Pac. vs. American Tie Co., 234 U. S. 138; N. P. vs. Solum, 247 U. S. 477). The other where the act complained of is directly prohibited by statute. In such the injured may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. vs. International Coal, 230 U. S. 184; Penn. R. R. vs. Puritan Coal, 237 U. S. 121; Penn. R. R. vs. Somner, 242 U. S. 120).

As the long and short haul clause of the Interstate Commerce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or

route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured party may in my judgment sue without first applying to the Commission for relief.

(2) The shipments involved in two of the cases were [40] by water from San Francisco to Portland and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension, the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier

controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.–W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions. [41]

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damage shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the court in Phillips vs. Grand Trunk (236 U. S. 662) which lends support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. f, 41 Stat. at L. 462) declared that "the period of federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin,

in Wenatchee Produce Co. vs. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except insofar as may be inconsistent with the provisions [42] of the act or any other act applicable to federal control or with any order of the President.

It would seem therefore that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206,

subdiv. a of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control. [43]

As the present actions could have been maintained in this court against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the

agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208–a, of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates involved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

Filed April 4, 1921. G. H. Marsh, Clerk. [44]

AND AFTERWARDS, to wit, on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit. [45]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Minutes of Court—April 4, 1921—Order Overruling Demurrer to Complaint.

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the Court being fully advised in the premises, it is ORDERED that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer.

Done and dated in open court this 4th day of April, 1921. [46]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation amending the complaint, in words and figures as follows, to wit: [47]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Stipulation Amending Complaint.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys as follows:

I.

That plaintiff's complaint may be amended by the addition of a paragraph following paragraph XIII, to be numbered XIII½, as follows:

"That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Port-

land Steamship Company over the route hereinabove specified, consigned to Allen & Lewis, the number of carloads of sugar on the dates and of the weights shown in the exhibit attached to stipulation amending complaint, designated as 'Supplementary Exhibit R (Allen & Lewis)' and made a part of this complaint, on all of which defendant received and collected as transportation charge the sum of 15 cents per hundred pounds, together with war tax of 3% thereon; that between the 25th day of June, 1918, and the 29th day of February, 1890, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Allen & Lewis, the number of carloads of sugar of the dates and weights shown in an exhibit attached to the stipulation amending complaint and described as 'Supplementary Exhibit S (Allen & Lewis)' [48] and made a part of this complaint, on all of which defendant received and collected as transportation charge the sum of 19 cents per hundred pounds, together with war tax of 3% thereon; that all of the said charges above in this paragraph enumerated on the shipments listed were paid by Allen & Lewis, and that said Allen & Lewis has heretofore and for a valuable consideration

sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified."

II.

That paragraph VII of defendant's answer may be amended by adding to line 7, of page 3, after the numeral XIII, the numeral XIII½.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
JOHN F. REILLY,
Of Attorneys for Defendant. [49]

AND AFTERWARDS, to wit, on the 23d day of April, 1921, there was duly filed in said court, an answer, in words and figures as follows, to wit: [52]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Answer.

Comes now the above-named defendant and for answer to the complaint of plaintiff herein, admits, denies, and alleges:

I.

Admits all of the allegations contained in paragraph I of plaintiff's complaint.

II.

Denies each and every allegation in paragraph II, except that defendant admits that the United States Railroad Administration was in control of and operating through the Director General of Railroads, the steamers of the San Francisco & Portland Steamship Company from May 30, 1918, to February 29, 1920, and that at the time the complaint was filed herein, defendant was the agent appointed by the President under section 206 of the Transportation Act of 1920, and defendant further denies that he is now such agent.

III.

Denies each and every allegation in paragraph III, except that he admits Oregon-Washington Railroad & Navigation Company filed an application with the Interstate Commerce Commission for permission to continue the ownership and control of a part of the stock of said San Francisco & Portland Steamship Company, and to continue operation of the steamships of said company between San

Francisco and Portland, and that its application was granted. [53]

IV.

Denies each and every allegation contained in paragraph IV, except that he admits that the rates therein mentioned were duly published, and were carried in the tarriffs mentioned on the dates alleged and up to February 29, 1920.

V.

Denies each and every allegation contained in paragraph V, except that this defendant admits that during the time said steamers of San Francisco & Portland Steamship Company were operated by the Director General of Railroads, said Director General charged a greater rate for the transportation of sugar from San Francisco to Portland than that called for in the Oregon-Washington Railroad & Navigation Company and San Francisco & Portland Steamship Company tariff from San Francisco to North Portland, and this defendant further admits that the difference between the rates named in said San Francisco & Portland Steamship Company's tariffs between said points are correctly stated in said paragraph of said complaint.

VI.

Denies each and every allegation contained in paragraph VI, except that he admits that on all shipments handled by said United States Railroad Administration a war tax was collected.

VII.

Denies each and every allegation contained in

paragraphs VII, VIII, IX, X, XI, XII, and XIII, except that he admits that during the time the United States Railroad Administration was operating the steamers of San Francisco & Portland Steamship Company it collected charges on all shipments of sugar from San Francisco to Portland on the basis named in said paragraph, and also collected a war tax thereon at the rate of three per cent., and further admits that the part [54] of said shipment referred to in said paragraphs which are alleged to have been shipped after May 30, 1918, were shipped and were consigned to the consignees named in said paragraphs.

VIII.

Denies each and every allegation contained in paragraphs XIV, XV, XVI, and XVII, except that defendant admits the accuracy of the statements as to rates collected on all shipments of sugar from San Francisco to Astoria; that Astoria is on the route of said steamship company between San Francisco and Portland, and that the part of said shipments referred to in said paragraph which are alleged to have been shipped after May 30, 1918, were shipped to the consignees named.

And for a further, separate, and affirmative answer and defense to the complaint herein, defendant alleges:

That on March 26, 1921, James C. Davis was appointed and succeeded this defendant as Director General of Railroads, and the agent appointed by the President under section 206 of the Transportation Act of 1920, and ever since has been and now

is the said Director General of Railroads, and the said agent, and the defendant herein is no longer such agent.

WHEREFORE, having fully answered, this defendant prays the complaint herein be dismissed, and defendant have judgment for his costs and disbursements herein.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, being first duly sworn, depose and say: That I am one of the attorneys for defendant within named; that I have read the foregoing answer, [55] know the contents thereof, and that the same is true as I verily believe; that I make this verification for the reason that said defendant is absent from the county of Multnomah and state of Oregon.

JOHN F. REILLY.

Subscribed and sworn to before me this 22d of April, 1921.

[Seal] ROSE W. SHENKER,
Notary Public for Oregon.

My commission expires June 26, 1922.

Service by copy admitted at Portland, Oregon, April 23, 1921.

GEO. B. GUTHRIE,
Of Solicitor for Plaintiff.

Filed April 23, 1921. G. H. Marsh, Clerk. [56]

AND AFTERWARDS, to wit, on Tuesday, the 26th day of April, 1921, the same being the 44th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [57]

In the District Court of the United States for the District of Oregon.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant,

Minutes of Court—April 26, 1921—Order of Substitution.

Based upon stipulation of the parties, it is hereby ordered that James C. Davis as agent of the United States Railroad Administration (San Francisco & Portland Steamship Co.) be and he is hereby substituted as defendant for John Barton Payne, Agent of the United States Railroad Administration (San Francisco & Portland Steamship Co.)

Done and dated in open court this 26th day of April, 1921.

CHAS. E. WOLVERTON,
Judge.

Filed April 26th, 1921. G. H. Marsh, Clerk. [58]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation waiving jury trial, in words and figures as follows, to wit: [59]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,
Defendant.

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties hereto by their respective attorneys that a jury be and is hereby waived in the trial of the above-entitled cause and that the said cause be tried before the court without a jury.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
C. E. COCHRAN,
Of Attorneys for Defendant.

Filed July 20, 1921. G. H. Marsh, Clerk. [60]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of July, 1921, the same being the 15th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [61]

In the District Court of the United States for the District of Oregon.

L.–8747.

July 20, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,

Defendant.

Minutes of Court—July 20, 1921—Trial.

Now at this day come the plaintiff by Mr. James G. Wilson, of counsel, and the defendant by Mr. C. E. Cochran, of counsel, whereupon upon motion of said parties by their respective counsel, it is ordered that this cause be and it is hereby consolidated for the purpose of trial with cause L.–8748, entitled A. J. Parrington vs. San Francisco & Portland Steamship Company.

Whereupon, this being the day set for the trial of this cause, the parties having filed a written stipulation waiving jury trial herein, said cause

comes on for trial before the Court. And the Court having heard the evidence adduced and the arguments of counsel, it is ordered and adjudged that special findings and judgment be prepared in favor of plaintiff and against defendant herein. [62]

AND AFTERWARDS, to wit, on the 5th day of August, 1921, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [63]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Findings of Fact and Conclusions of Law.

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been sub-

mitted by both parties, the Court being fully advised, does now make and find from the issues presented by the pleadings and the evidence offered the following

FINDINGS OF FACT.

I.

That from noon of December 28, 1917, to midnight of February 29, 1920, the United States Railroad Administration was in control of the line of steamboats and steamships between San Francisco, California, and Portland, Oregon, belonging to the San Francisco & Portland Steamship Company, and was operating the same as a common carrier in interstate commerce under the authority of the United States Director General of Railroads; that the defendant is the duly appointed, qualified, and acting agent of the United States Railroad Administration and is authorized to represent it in the defense of this action. [64]

II.

That the Oregon, Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as amended by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco & Portland Steam-

ship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the San Francisco & Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company, and that said line was being operated in the interest of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that the said Oregon-Washington Railroad & Navigation Company might continue the operation of said line subsequent to July first, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco & Portland Steamship Company to file with the Commission all of its tariffs, rules, and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco & Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation [65] Company its rates on sugar between San Francisco and

North Portland, Oregon; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the San Francisco & Portland Steamship Company.

III.

That prior to taking control of said line of steamboats and steamships by the said United States Railroad Administration, said San Francisco & Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company established and filed with the Interstate Commerce Commission a schedule of rates,. including a rate on sugar in carload lots of #30,000 minimum, from San Francisco to North Portland, and that the rate so established was continued in effect and adopted by the United States Railroad Administration during its operation of said line and the operation of the line of the Oregon-Washington Railroad & Navigation Company; that the rate on sugar in carload lots so published, filed, and put into effect was twelve and one-half (12½) cents per hundred pounds at all times between noon of December 28, 1917, and June 24, 1918, inclusive; and was fifteen and one-half (15½) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920; that the United States Railroad Administration carried from San Francisco to

Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all of the shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments so carried from and including the 29th day of December, 1917, to and including [66] the 24th day of June, 1918, charged and collected for its transportation charges at the rate of fifteen (15) cents per hundred pounds; and on all shipments so shown on said exhibits from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920, charged and collected the sum of nineteen (19) cents per hundred pounds; and in addition to such charges collected and received on all such shipments war tax at the rate of 3% on the freight charged.

IV.

That all of said charges at said rates were paid by the plaintiff's assignors to the United States Railroad Administration; that the amount of the excess charges so collected by the United States Railroad Administration from the plaintiff's assignors between the 29th day of December, 1917, to and inclusive of the 24th day of June, 1918, over and above what said shipments would have earned if charged at the rate in effect from San Francisco

to North Portland was and is the sum of three thousand two hundred and 90/100 dollars ($3,200.90); and the amount of such excess charges so collected by the United States Railroad Administration from and including the 25th day of June, 1918, to and including the 29th day of February, 1920, was and is the sum of four thousand, one hundred thirty-eight and 16/100 dollars ($4,138.16).

V.

That Portland and Astoria, Oregon, are intermediate between San Francisco, California, and North Portland, Oregon, on the route established by the San Francisco & Portland Steamship Company in connection with the Oregon-Washington [67] Railroad & Navigation Company, and continued in effect by the United States Railroad Administration for shipments of sugar between San Francisco and North Portland, and the United States Railroad Administration charged and collected on all of the shipments to Portland and Astoria a greater sum than the rates established by it on shipments of sugar from San Francisco to North Portland, and that said shipments from San Francisco to Portland and Astoria moved over the same route in the same direction, and the haul from San Francisco to Portland and Astoria was included within the haul over the route so established from San Francisco to North Portland, said excess of charges so made being the amount shown in the preceding paragraph.

VI.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco & Portland Steamship Company that it would at noon on October 15, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco & Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," that thereafter formal charters were executed as of October 15, 1917, covering the steamships "Beaver" and "Rose City" owned by the San Francisco & Portland Steamship Company, that on the 24th day of May, 1918, the United States Shipping Board notified the San Francisco & [68] Portland Steamship Company as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships 'Beaver' and 'Rose City,' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VII.

That the United States Railroad Administration during all of the time from December 29, 1917, to February 2, 1920, on all of the shipment shown in

the exhibits attached to the complaint and to the stipulation amending the complaint, issued its bills of loading whereby it agreed to transport said sugar and collected from plaintiff's assignors the charge for the transportation of said shipment, and did not cancel its tariffs on file with the Interstate Commerce Commission at any time during said period, but at all times accepted shipments under said tariff and collected charges thereon.

VIII.

That the shippers who shipped said sugar over the line of the San Francisco & Portland Steamship Company operated by the United States Railroad Administration as listed on the exhibits attached to plaintiff's complaint and to the stipulation amending plaintiff's complaint have each and all assigned their claims for the collection of said overcharges by the United States Railroad Administration from the said shippers to the plaintiff herein, and he is the lawful owner and holder thereof; that the sum of fifteen hundred dollars ($1500.00) is a reasonable sum to allow the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fee to cover only the work with reference to said collection in this court and not on any appeal therefrom. [69]

From the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload

lots from San Francisco, California, to Portland and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates esablished and in effect from San Francisco to North Portland, Oregon over the line of the San Francisco & Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the United States Railroad Administration having issued its bills of lading and collected the freight charges on shipments between December 28, 1917, and May 29, 1918, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the San Francisco & Portland Steamship Company.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of seven thousand three hundred [70] thirty-nine and 6/100 dollars ($7,339.06), together with interest at the rate of six per cent per annum on the sum of three thousand two hundred and 90/100 dollars ($3,200.90) from the

25th day of June, 1918, and together with interest at the rate of six per cent per annum on the sum of four thousand one hundred thirty-eight and 16/100 dollars ($4,138.16) from March first, 1920, and fifteen hundred dollars ($1,500.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [71]

AND AFTERWARDS, to wit, on Thursday, the 5th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [72]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Minutes of Court—August 5, 1921—Judgment.

This matter coming on, on application of the plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises,—

It is therefore ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C. Davis, Agent of the United States Railroad Administration, judgment in the sum of seven thousand three hundred thirty-nine and 6/100 dollars ($7,339.06), together with interest at the rate of six per cent per annum on the sum of three thousand two hundred and 90/100 dollars ($3,200.90), from the 25th day of June, 1918, and together with interest at the rate of six per cent per annum on the sum of four thousand one hundred thirty-eight and 16/100 dollars

($4,138.16) from March first, 1920, and fifteen hundred dollars ($1500.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of $18.61, and it is further ADJUDGED AND ORDERED that the defendant pay said sum promptly to the plaintiff as required by section 206 of the Transportation Act of 1920.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh., Clerk. [73]

AND AFTERWARDS, to wit, on the 21st day of September, 1921, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit: [74]

In the District Court of the United States for the District of Oregon.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 20th day of July, 1921, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E. Cochran, respectively the attorneys, and jury by a stipulation in writing filed in this Court was waived and said case tried to the Court.

WHEREUPON the following proceedings were had:

Mr. Wilson offered documentary evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action.

Mr. WILSON.—I offer in evidence the Proclamation of the President of the United States as contained in 40 Statutes at Large, at page 1733, and the following portion of said Proclamation was read:

> "Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers [75] thereto me enabling, do hereby through Newton T. Baker, Secretary of War, take possession and assume control, at 12 o'clock noon, on December 28, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within

the boundaries of the Continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon, or operated as a part of such rail or combined rail and water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that, so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interests may require, and of the usual and ordinary business and duties of common carriers."

Mr. WILSON.—I offer in evidence a copy of the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company, under the provisions of Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act in connection with the ownership of The San Francisco and Portland Steamship Company. The opinion is not certified but is reported in 34 I. C. C. 165.

Mr. COCHRAN.—We object to the document as immaterial and irrelevant in that its subject matter has no part in the proof of plaintiff's claim against the Director General of Railroad, but we [76] do not make a point upon the fact that the document appears to be uncertified, and that plaintiff not being a party to the proceedings before the Interstate Commerce Commission is neither bound or benefited by that decision.

COURT.—Admitted, subject to objection.

The document was marked Plaintiff's Exhibit 2 and is physically attached to plaintiff's bill of exceptions and made a part hereof.

Testimony of A. J. Parrington, on His Own Behalf.

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. WILSON.

My name is A. J. Parrington; residence, Portland, Oregon; business, Traffic Attorney for about twelve years. I have been employed in the Traffic Department in various capacities with different railroads, the last with the Oregon-Washington Railroad & Navigation Company for the past twelve years. My work had consisted almost solely in the preparation and reading of tariffs. I have a map showing the location of the line of The San Francisco and Portland Steamship Company.

This document was marked Plaintiff's Exhibit 3 for identification.

(Testimony of A. J. Parrington.)

The witness marked upon Exhibit 3 the location of Astoria with letter "A," the city of Portland with letter "B," and the location of North Portland with letter "C."'

The route of The San Francisco and Portland Steamship Company from San Francisco to Portland is as follows:

Passing through the Golden Gate to the Pacific Ocean, thence to the mouth of Columbia River, thence into this river to Astoria, thence up Columbia River to Willamette River, thence to Portland, Oregon. North Portland is located about five miles above the junction [77] of the Willamette and Columbia Rivers on what is called Columbia Slough.

Thereupon counsel for plaintiff inquired as follows:

Q. Is it on the route of The San Francisco and Portland Steamship Company?

Mr. COCHRAN.—I object to that as immaterial.

COURT.—Objection overruled.

To which ruling counsel for defendant excepted and its exception was duly allowed.

A. It is not.

The witness then testified further that the steamers of The San Francisco and Portland Steamship Company do not stop at North Portland, nor do the tariffs of said Company name rates to North Portland. The San Francisco and Portland Steamship Company during the times referred to in the complaint was party to certain tariffs naming rates from San Francisco to North Portland. They are

(Testimony of A. J. Parrington.)

Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, I. C. C. 384, effective February 17, 1916, Item 445 of the tariff which names rates on sugar from San Francisco to North Portland of 12½¢ provides "via route No. 1 as shown on Page 34" under the caption of "Routing" shows Route No. 1 via The San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland.

Mr. WILSON.—It is admitted in the pleadings that the Oregon-Washington Railroad & Navigation Company's line of railroad extends from Portland to North Portland.

The witness continued: Item 445 of the tariff naming rates from San Francisco to North Portland of 12½¢ for 100 pounds on sugar, carload lots, minimum weight 30,000 lbs., continued in effect from February 17, 1916, to June 24, 1918. [78] On June 25, 1918, a special supplement No. 14 to the same traiff increased the rates from 12½¢ to 15¢. That change was authorized by the Director General of Railroads under General Order No. 28 which advanced with few exceptions all rates over the entire United States 25 per cent. The 15½¢ rate continued in effect until the expiration of the tariff July 4, 1919. Thereafter the rates were carried in the Oregon-Washington Railroad & Navigation Lines' Tariff No. 131–B, I. C. C. No. 589, effective July 4, 1919, Item 460 of that tariff continued the rate from

(Testimony of A. J. Parrington.)

San Francisco to North Portland of 15½¢ via Route No. 1 as shown on page 36 of the tariff. Route No. 1 as shown on page 36 of the tariff provides that movement northbound would be via San Francisco and Portland Steamship line, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. That rate was continued in effect up to and including August 25th, 1920, by Supplement No. 8 to the same tariff, effective August 26, 1920, the rate of 15½¢ was increased to 19½¢. This increase is the result of the Interstate Commerce Commission decision in Ex parte 74, 58 I. C. C. Reports 220. The rates in that tariff were continued to January 15, 1921, and thereafter the same rate was carried in S. J. Henry Tariff No. 2-A, I. C. C. 35, effective January 15th, 1921.

These tariffs were admitted in evidence and marked Plaintiff's Exhibit 4.

STIPULATION OF COUNSEL.

It is stipulated and agreed that in making up the final record the material parts of these tariffs, as read by the witness, may be copied at length in the record with the same evidential effect as the original documents.

The witness continued: The rate on sugar from San Francisco to North Portland was [79] increased by Supplement No. 3 to North Pacific Coast Freight Bureau Tariff No. 2, I. C. C. No. 35, by S. J. Henry, Agent, from 19½¢ to 24¢, effective April 30th, 1921.

The witness continued: The rates actually

(Testimony of A. J. Parrington.)

charged on the sugar movement from San Francisco, California, to Portland, Oregon, was as follows:

From May 1, 1915, to May 10, 1916, 12½¢ per 100 lbs.

From May 10, 1916, to June 24, 1918, 15¢ per 100 lbs.

From June 25, 1918, to Aug. 25, 1920, 19¢ per 100 lbs.

From Aug. 26, 1920, to July 10, 1921, 24¢ per 100 lbs.

There are no shipments described in the complaint subsequent to the last mentioned date.

The witness continued: At North Portland the Swift Packing Company used sugar in pickling their meats. I understand they are large consumers. The movement of sugar by the Railroad Administration to Portland moves from San Francisco to Portland via the same boats over the same route. With respect to shipments of sugar to Astoria, the tariffs provide the same rates as to Portland during the periods covered by the tariffs hereinbefore read. Shipments to Astoria as far as they go move over the same route from San Francisco as those to North Portland.

The witness continued: I have a document which is the original shipping receipt or bill of lading issued by The San Francisco and Portland Steamship Company, dated San Francisco, December 1, 1917, issued by F. O. Schullerts, Agent, The San Francisco and Portland Steamship Company at San Francisco.

(Testimony of A. J. Parrington.)

(Document offered in evidence marked Plaintiff's Exhibit 5.)

Mr. WILSON.—I have numerous expense bill receipts of The San Francisco and Portland Steamship Company subsequent to October 12, 1917. I offer in evidence expense bill of The San Francisco and [80] Portland Steamship Company showing receipt of payment of transportation charges on sugar issued to Mason, Ehrman & Company, December 5, 1917, being within the period which is involved in these cases.

(Document received in evidence marked Plaintiff's Exhibit 6.)

Mr. WILSON.—I have receipts representing each shipment mentioned in the complaint.

Mr. COCHRAN.—Show me one of those from the Railroad Administration.

(Mr. Wilson shows one.)

Mr. COCHRAN.—I will agree that receipts from forms similar to Plaintiff's Exhibit 6 were issued in respect to each shipment mentioned in the complaint against the Director General of Railroads, and against Mr. James C. Davis, Agent. I will also agree that Plaintiff's Exhibit 6 in substance and effect may be considered as the type of those receipts without the necessity of producing the original, but I deny the legal effect claimed by counsel, and will contend that the San Francisco and Portland Steamship Company since October 12th, 1917, to May 29th, 1918, was acting solely as agent for the United States Shipping Board or the United States

(Testimony of A. J. Parrington.)

Shipping Board Emergency Fleet Corporation pursuant to requisitions by Mr. Bainbridge Colby, Commissioner, and charter-parties subsequently entered into, effective October 12th, 1917, which documents will be subsequently offered in evidence.

Q. (By Mr. WILSON.) Mr. Parrington, do you keep a file of all tariffs with reference to shipments in this locality?

A. I have practically a complete set of tariffs covering this territory.

Q. Did you ever receive any notice, or do your tariffs show that any cancellation of the tariffs of The San Francisco and Portland Steamship Company on October 12, 1917, or any subsequent date, was made? Between that and May, 1918? [81]

A. The San Francisco and Portland Steamship Company's northbound freight tariff No. 4, I. C. C. No. 10, was in effect at the time—at all times between August 4, 1914, and February 20, 1920.

Q. No cancellation?

A. The tariff was supplemented during that time, but at no time does the Emergency Fleet Corporation, or the United States Shipping Board appear as a party to the tariff. Nor does The San Francisco and Portland Steamship Company appear as agent for the United States Shipping Board Emergency Fleet Corporation.

Q. Now, Mr. Parrington, I will ask you whether or not in any of these tariffs which you have referred to as naming rates to Portland, there is contained on the title page a reference to any order of

(Testimony of A. J. Parrington.)

the Commission authorizing The San Francisco and Portland Steamship Company to charge more for the carriage of sugar to Portland than it participated in rates on the same commodity to North Portland?

A. It does not.

Q. Have you with you Tariff Circular 18-A of the Interstate Commerce Commission?

A. I have.

Mr. WILSON.—I would like to offer in evidence and read in evidence the requirements of the Interstate Commerce Commission with reference to showing on tariffs any authority for violation of the long and short haul clause. It is a part of Rule 77 of Tariff Circular 18-A of the rulings of the Interstate Commerce Commission, and reads as follows:

"When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distance over the same line or route, the title page of each tariff issued and filed under such authority must bear [82] the following notations: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Order FS. No. —— of (date) 19 ——,' When the Commission has issued an order granting a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge

(Testimony of A. J. Parrington.)

rates or fares higher than the aggregate of the intermediate rate, or fares subject to the rate, title page of each tariff issued and filed under such authority, must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the interstate rates (or fares) subject to the Act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order FS. No. —— of (date) 19——.' Nothing in this rule may be considered as waiving any provisions of the amended fourth section of the Act to Regulate Commerce."

Cross-examination.

(Questions by Mr. COCHRAN.)

Q. Here is a document which has been marked for identification, Defendant's Exhibit "A," having the purport of being the map of Portland Harbor. I will ask you to examine the document and say if you agree with me that it is such map, and fairly and correctly represents the location of Portland Harbor—indeed, that the map is what it purports to be.

A. It is.

(The document was offered in evidence, received and marked Defendant's Exhibit "A" and is attached to this bill of exceptions and made a part hereof.)

The witness continued: [83]

The scale on the map has graduated up to 4,000 feet.

STIPULATION OF COUNSEL.

It is agreed between counsel that on Defendant's Exhibit "A" the scale of the map is 2¼ inches equals 4,000 feet.

The witness in respect to Defendant's Exhibit "A" further testified:

The portion of the map marked "Columbia River," and the junction of Columbia River with another river marked "Willamette River" represents the junction of these two rivers, and is the place where a steamship carrying cargo from San Francisco, via Columbia River, to Portland would depart from the Columbia River to enter the Willamette River. The portion marked "North Portland Harbor" is the place which I referred to in my direct examination as "Columbia Slough." North Portland is located on Defendant's Exhibit "A" as approximately 12 inches from the junction of the river, and what is shown as North Portland Harbor, and I will mark North Portland with the letter "C" which is the same description used upon Plaintiff's Exhibit 3. The lines shown upon defendant's Exhibit "A" as "City Boundary" represents the corporate limits of the City of Portland. There is a line of railroad extending from North Portland, owned by the Oregon-Washington Railroad & Navigation Company, to a junction which is marked with the letter "J" upon Exhibit "A," and then extends over to the Willamette River in a rather westerly direction to a place called Municipal Terminal No. 4. There is also a line of railroad

(Testimony of A. J. Parrington.)

extending from North Portland from point "C" on Defendant's Exhibit "A" over the same route to the junction which has been marked "J," and there goes straight on south into the City of Portland up to the yards and through the terminal to Albina Yards, which is shown on the exhibits as "O.-W. R. & N. Co. Albina Yards," and to various terminals, docks and warehouses as shown upon the map. The berth of the steamships of The San Francisco and [84] Portland Steamship Company in Portland is Ainsworth Dock, located on the west side of the Williamette River between the Broadway and Steel Bridges. It is connected with tracks of the Northern Pacific Terminal Company. Transfer from ship to rail is usually at Ainsworth Dock. I know transfers were made at Ainsworth Dock, but we don't claim transfer of this sugar.

Q. (By Mr. COCHRAN.) Do you know, as a matter of fact, that the Steamship Company unloads at any of these docks along the river from Municipal Terminal No. 4 clear up to the other Municipal Terminals on this Exhibit "A," don't you?

A. The tariffs of the company provide that the steamships will stop at one or more flour mills for cargo of a certain amount. They will not stop at miscellaneous docks for small cargo, either to take on or discharge cargo, a few carloads. They specify the number of tons for which they will call at a dock, and I believe it is in the neighborhood of 400 tons.

Q. Here is a ruler. Will you tell us the distance

(Testimony of A. J. Parrington.)

from the water connection with rail at Municipal Terminal No. 4 up to the Ainsworth Dock, which is marked on this Exhibit "A" as No. 57?

A. It is approximately 22 inches.

Q. Twenty-two inches upon the map. The other is approximately 12 inches?

A. Twelve inches.

Q. Now, tell us the difference from Municipal Terminal No. 4 by rail to North Portland.

A. That is a varying line and you can measure only straight; can only get an approximate distance, approximately 11 inches upon the map.

Q. Now, the distance upon the ground would be those inches multiplied [85] by 4,000 feet?

A. It would.

Redirect Examination by Mr. WILSON.

At the various docks here in the City of Portland, to which reference has been made, that the company will stop for cargo of a certain amount, which you say you think is 400 tons, does the Portland rate apply at all these docks wherever they land?

A. It does.

Q. Is there any place between the mouth of the Columbia River and the Ainsworth Dock, the regular berth of these steamers, where the rate is shown by the tariff as anything less than the Portland rate? A. No.

Recross-examination by Mr. COCHRAN.

Swift & Company, at North Portland, do not buy

(Testimony of A. J. Parrington.)

sugar for the purpose of selling it to the trade. They merely use it in the pickling and preserving of their meats. There is no business at North Portland of the type of my assignors, such as Allen & Lewis, Mason, Ehrman & Company, and the Pacific Coast Biscuit Company, but the rate is there for their use if they choose to distribute from there.

Redirect Examination by Mr. WILSON.

The tariff makes no distinction between sugar for curing ham and sugar for preserving bought here in Portland. Sugar is sugar under the tariff, and it all moves under that rate, whether it is of the character they use in curing hams or the character they use for the table.

COURT.—Is North Portland Harbor, as marked on that map, Plaintiff's Exhibit "A," navigable for boats the size of those operated [86] by the Steamship Company as far as North Portland?

A. I could not answer that question.

Mr. WILSON.—I think the lumber schooners go in there for the Monarch Mills.

A. I believe. I have no knowledge.

Mr. COCHRAN.—Our steamers, I understand, have put in there at North Portland.

COURT.—Your steamers have?

A. Yes.

COURT.—Regularly? All steamers north?

Mr. COCHRAN.—I don't think regularly, your Honor. I think probably only during high water.

(Testimony of James G. Wilson.)

Mr. Mount, our Assistant General Freight Agent, tells me there is ample water for all boats drawing up to 16 feet, I think, to go up there, but our general course, however, is Willamette and Columbia Rivers, not into these sloughs.

Testimony of James G. Wilson, for Plaintiff.

JAMES G. WILSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows, without interrogation:

Mr. COCHRAN.—I will admit counsel is an attorney of this court, and has had many years of experience in commerce procedure and trial of cases, and is familiar with cases of this kind.

Mr. WILSON.—I have been the attorney for plaintiff since the inception of this case. There are involved in this case a great many overcharges on separate bills. I assume there will be approximately—the overcharges will average, perhaps $18 to $20 on each shipment. It involves the examination and preparation of a great many expense bills, bills of lading and considerable time in the preparation of the case. In addition to that, there has been involved argument on demurrer. For the preparation of that, the time involved was, I should say, ten days or two weeks. Briefs were filed, and a considerable amount of work involved with them. There is [87] involved in this case approximately $7,500.00 of overcharges, and I think

(Testimony of A. J. Parrington.)

$1500.00 is a reasonable attorney's fee for the Court to assess.

Testimony of A. J. Parrington, on His Own Behalf (Recalled).

A. J. PARRINGTON, plaintiff, recalled as a witness on his own behalf, testified as follows:

Direct Examination.

While on the stand previously I spoke about the tariffs of The San Francisco and Portland Steamship Company providing for stopping at other wharves in the city of Portland for delivery or reception of traffic of a certain amount. I have the tariffs with me. As showing the practice of the San Francisco and Portland Steamship Company relative to picking up freight or delivering freight at outside docks other than their regular place of landing, I read from the San Francisco and Portland Steamship Company's South-Bound Local Freight Tariff No. 5, I. C. C. No. 11, under the title of "Absorption," Paragraph A:

> "When shipments of barley, flaxseed, oats, rye, wheat, or mill feed in lots of 200 tons or over are accepted, the Company may at its option, send its steamers to outside docks at Portland to receive such grain or mill feed, in which event, no charge in addition to the freight rate as shown herein will be made."

Paragraph D under the same caption reads as follows:

(Testimony of A. J. Parrington.)

"On freight in carload lots, originating at points outside of Portland or Astoria, Oregon, delivered at this Company's regular place of landing in Portland or Astoria, and shipped under regular bill of lading from Portland or Astoria to San Francisco, the cost of unloading such freight from cars and charging for switching such cars from railroad to such landing at Portland or Astoria, will be assumed by this company when the tariffs providing for the absorption of such is legally on file at the Interstate Commerce Commission."

There is no provision for picking up or delivering freight at docks or landing places other than the regular landing place in the northbound tariff. [88]

Cross-examination by Mr. COCHRAN.

Will you refer to the tariff, northbound tariff, San Francisco and Portland Steamship Company No. 4, I. C. C. No. 10, and see whether or not there is anything in that tariff which indicates the rates solely to the regular landing place or berth of the steamers.

A. By inference only. There is no mention of the regular landing place, but it does mention dock. By "dock" you would infer the regular dock.

Q. That is your inference. Where does it mention dock?

A. Well, in the second paragraph on third re-

(Testimony of A. J. Parrington.)

vision, page 3, under the caption of "Absorption."

Q. That is southbound tariff?

A. No, this is northbound tariff, the one you just referred to.

Q. Now, you have referred to a paragraph entitled "Absorption" on page 3, of the northbound local freight tariff of the San Francisco and Portland Steamship Company.

A. Yes, third page, No. 3.

Q. Which reads as follows: "On freight in carload lots"—

A. Just a moment. The second paragraph I referred to.

Q. I am reading the first: "On freight in carload lots originating at points outside of San Francisco, delivered in cars at this company's regular landing place in San Francisco, and shipped under local bill of lading from San Francisco to Astoria and Portland, Oregon, the switching charges in San Francisco assessed by the California State Belt Railroad and the expense of car unloading, will be assumed by this company." Now, you observe nothing there that relates to Portland, do you?

A. Only shipments which are destined to Portland it covers.

Q. But there is nothing about the point of delivery in Portland being tied up specifically to a regular landing place in Portland, [89] is there?

A. No.

(Testimony of A. J. Parrington.)

Q. Now, the next paragraph: "On northbound carload freight, consigned to firms located on industrial tracks, this company will, when consignees desire to take delivery by switching freight in cars from dock to warehouse, load such freight into cars free of charge." Now, there isn't a word there said about a particular landing place, is there? So if a man had freight going to North Portland, this company agrees there if he desires to switch in freight-cars to load into the freight-cars free of charge. That could be accomplished on Municipal Terminal No. 4, couldn't it? A. It could.

Q. Or any other dock, whether it was the regular landing place or not? A. It could.

Witness rests.

Testimony of J. W. Mount, for Defendant.

J. W. MOUNT, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. COCHRAN.

I am Assistant General Freight Agent of the Union Pacific System, Portland, Oregon. This system includes The San Francisco and Portland Steamship Company. During Federal control of railroads I was Special Examiner for the Portland District Freight Traffic Committee of the United States Railroad Administration. I have been engaged in handling tariffs and traffic in the traffic

(Testimony of J. W. Mount.)

department of the transportation companies approximately twenty years, and am acquainted with traffic matters, tariffs, their making, how the amounts of charges are arrived at, and have had experience in determining the reasonableness of rates. I am acquainted with the Steamship [90] Company's rates from San Francisco to Portland, also the rates by rail lines from San Francisco to Portland, and have made comparisons between the two. The water rate from San Francisco to Portland, carloads, on May 10, 1916, was 15 cents per 100 pounds. The rate by Southern Pacific on the same commodity from San Francisco to Portland was 20 cents per 100 pounds. The normal rate on sugar by water on this date was the fifth-class rate. The normal basis of rates were departed from for different reasons, and in this particular instance the commodity rate was less than the normal class rate to meet competition of steam schooners and other lines of steamships operating between San Francisco and Portland, who do not file their tariffs with the Interstate Commerce Commission. I have particularly in mind the steamship lines of the Parr McCormick Company. Their business is the transportation of lumber from Portland to San Francisco, but they bring cargo northbound. By operating in this manner cargo affords ballast as well as reducing operating expenses. They are permitted to make a very low rate. The rate on sugar

(Testimony of J. W. Mount.)

from San Francisco to Portland via water line was really below normal and reasonable rate in that it was established to meet competitive conditions over which they had no control or over carriers which were not subject to governmental control, and who could make rates at their pleasure. There is no competition at North Portland with any of plaintiff's assignors in the line of similar business dealing in sugar at that point.

Cross-examination by Mr. WILSON.

Municipal Dock No. 4 is located at St. Johns Terminal, ordinarily referred to as St. Johns Terminal. It is on the line of Oregon-Washington Railroad & Navigation Company. Rule 20 of The San Francisco and Portland Steamship Company's Northbound Local Tariff No. 8 naming class and commodity rates from San Francisco and Portland effective [91] August 25, 1920, reads as follows:

> "On carload freight, billed to rail points beyond Astoria or Portland, Oregon, the cost of loading such freight in cars together with cost (as lawfully on file with the Interstate Commerce Commission and when such charge is not absorbed by connecting carrier) of switching such cars from this carrier's regular place of landing at Astoria or Portland to the railroad, will be assumed by this carrier."

There is a note immediately following this rule which reads as follows:

(Testimony of J. W. Mount.)

> "Note: The St. Johns (or Peninsula) Tunnel and Willbridge, Oregon, will be considered hereunder a 'rail point beyond Portland, Oregon.' "

Willbridge is opposite St. Johns on the west side of Willamette River, on the line of the Spokane, Portland & Seattle Railway Company. The San Francisco and Portland Steamship Company gets out circulars the same as other lines, advertising matter, that its place of leaving and landing is Ainsworth Dock, foot of Second Street, for passengers only, that is, not for freight. This circular says that Portland sailings will be from Ainsworth Dock, foot of Second Street, and I never knew them to take passengers at any other place but Ainsworth Dock, but they take freight at different places in the City of Portland. The amount of freight to be received at other places in the City of Portland is left largely to the discretion of the General Manager of the company, but they don't obligate themselves to stop for anything less than 200 tons; and that only at the Steamship Company's option. It has a right to get freight at all points in the city at its option. The tariffs make the broad statement that the rates apply between San Francisco and Portland, and, of course, Portland includes a large terminal territory, but it does not include North Portland. The San Francisco and Portland Steamship Company does not publish

(Testimony of J. W. Mount.)

any rate to North Portland except it is a party to tariffs naming rates [92] to North Portland in connection with rail haul transferred at Portland.

Redirect Examination by Mr. COCHRAN.

The situation, summing it up, is that the tariffs recite charges on sugar, for example, The San Francisco and Portland Steamship Company's haulage from San Francisco to Portland without stating in these tariffs as to what part of Portland it will be received or delivered. The combination tariffs filed by Oregon-Washington Railroad & Navigation Company on behalf of itself and of the Steamship Company, which have been referred to here as being in effect during the time the various shipments moved between San Francisco and North Portland plainly says San Francisco and Portland Steamship Company, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. These tariffs would be complied with on a shipment moving from San Francisco to North Portland if the Steamship Company shall have passed the traffic over Municipal Terminal No. 4 as a connection between water and rail line bound for North Portland. There is a line of railroad extending from North Portland to Municipal Terminal No. 4 owned by the Oregon-Washington Railroad & Navigation Company, and likewise a line of railroad from North Portland up into the business section of Portland around the Albina Yards and

(Testimony of J. W. Mount.)

across the Willamette River by a railroad bridge to a connection with the tracks of the Northern Pacific Terminal Company in Portland, and thence to the Ainsworth Dock on the west bank of the Willamette River. The distance from San Francisco to North Portland via Municipal Terminal No. 4 is shorter than the distance from San Francisco to the Ainsworth Dock in Portland, Oregon, although it is possible because of the tracks being physically laid that way for traffic, if any, shall have moved from San Francisco to North Portland to come over the Ainsworth Dock, that is, come up by water to the Ainsworth Dock, pass over the dock to rail connection, and [93] *and* thence to North Portland, and the same movement is possible if traffic shall have still moved from Municipal Terminal No. 4.

The witness then examined Defendant's Exhibit "A" for the purpose of identifying it a little stronger than was done by the witness Parrington.

Defendant's Exhibit "A" contains a legend index to Port Facilities. No. 2 in this index refers to "Portland Municipal Terminal No. 4, Grain Elevators, etc.," and upon the map in a small circle at Municipal Terminal No. 4 is a figure 2. Likewise on the map are a number of small circles with figures therein which will furnish an index to ascertain the name of the facility to which the figures refer. Ainsworth Dock is marked "No. 57," and by finding the figures 57 in a circle upon Exhibit

(Testimony of J. W. Mount.)

"A" will give us the location of Ainsworth Dock. The red line extending from North Portland south, which crosses the Willamette River, and marked "Spokane, Portland & Seattle Railroad" correctly shows the relative location of that line. Summing up the situation, North Portland is more distant from San Francisco than Portland by a route passing from Ainsworth Dock, and it is less distant by a route passing over Municipal Terminal No. 4, and the tariffs in effect at the time of the movement of these various shipments mentioned in the complaint permit either movement, that is, via Ainsworth Dock to rail connection, or via Municipal Terminal No. 4 to a rail connection.

Recross-examination by Mr. WILSON.

As far as the tariffs are concerned and as far as the rates are concerned, it is possible for every shipment moving by The San Francisco and Portland Steamship Company and thence by Oregon-Washington Railroad & Navigation Company to North Portland to move through the Ainsworth Dock. [94]

Thereupon Mr. Wilson asked witness the following question:

Q. And that would be the natural and customary route, would it not?

Mr. COCHRAN.—I object to that as immaterial. We have a law question involved as to whether Portland is intermediate to North Portland.

(Testimony of J. W. Mount.)

COURT.—That is a question of fact, isn't it?

Mr. COCHRAN.—A question of fact, yes, but it is to be determined not by what is possible. There are no shipments from San Francisco to North Portland.

COURT.—He can answer the question.

To which ruling defendant excepted, and his exception was duly allowed.

A. I will answer it by saying yes.

The municipal authorities of the City of Portland operating Municipal Dock No. 4 do not file tariffs with the Interstate Commerce Commission. They simply publish a wharf charge not subject to the Act to Regulate Commerce.

Thereupon the following questions and answers were given:

Q. If the San Francisco and Portland Steamship Company, in connection with the Oregon-Washington Railroad & Navigation Company, was moving over the Municipal Dock, does it publish any charge in connection with use of the Municipal Dock? Or does it absorb it? A. Municipal Dock?

Q. Yes, No. 4.

A. I have just stated I am not familiar with their tariffs because they change oftener than the moon does.

Q. I am asking you the O.-W. R. & N. tariff under which you say it could move through the Municipal Dock—I am asking you whether or not

(Testimony of J. W. Mount.)

in the O.-W. R. & N. Company, or The San Francisco and Portland Steamship [95] Company publishes anything in regard to the use of the terminal, or the taking of the stuff over the terminal? A. Yes.

Q. What is it?

A. If the through rate includes any—if we have a through rate published from San Francisco to Portland, it would include the charges at Municipal Dock Terminal No. 4.

Q. Does it publish anything? You know there is a charge made there for every ton that goes over the Municipal Dock. The city gets a charge on it.

A. They get a charge from somebody, yes, but on a through rate from San Francisco to Portland, or San Francisco to North Portland via Municipal Dock No. 4, the O.-W. R. & N. Company would have absorbed that charge.

Q. They don't publish any such absorption, do they?

A. The through rate is the absorption itself.

Q. But do they publish they will absorb any such charge?

A. Well, the rate itself includes it. We couldn't publish a rate—we don't say will be any charge. That is the way we publish the rate, we publish it through.

Q. All right. Then you say your tariff does not publish the absorption of any charge at the Municipal Wharf?

(Testimony of J. W. Mount.)

A. No, sir; I don't say so. I say that the rate itself includes that charge. When you publish a through rate between two points, that means we have to perform the service to get from that one point to the other; that is self-evident. If you were shipping freight and paying freight charge, and the tariff was a rate from San Francisco to North Portland of say, 15 cents per hundred, you would not pay more, and we couldn't collect more. We can only collect what we file with the Commission. [96]

Q. If the City of Portland publishes this charge, somebody has to pay.

A. If we in our tariff say we will handle a shipment from San Francisco to North Portland for 15 cents, not going to charge wharfage or switching or anything; that includes all service performed.

Q. Do you publish the fact in your tariff you will absorb any charge at the Municipal Wharf for any tonnage that goes across the wharf?

A. You mean do we by specific expressions say that?

Q. Yes, I do.

A. We don't come out and specially say so, because we don't have to, and because—

Q. That is a matter of law whether you have to or not.

A. Let me finish my answer. As an expert tariff man for the past 12 or 15 years, it has been my practice when I publish a through rate from one point

(Testimony of J. W. Mount.)

to another, that includes all service incident to getting that traffic from Point A to Point B, for instance.

Q. You don't specifically publish, however, in case it goes over the Municipal Dock that you will absorb that charge?

A. It is so stated when you publish the rate.

Q. But you do have facilities whereby you can handle it over your own property, don't you?

A. Yes, we could do it.

Q. And that is the way you ordinarily do it, isn't it?

A. Not altogether.

The witness continued: All sugar going on the Oregon-Washington Railroad & Navigation Company's line coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically sugar can transfer from water to rail at Municipal Dock No. 4, and [97] that it is just as good if not a better physical connection than at Ainsworth Dock.

Testimony of Charles E. Cochran, for Defendant.

CHARLES E. COCHRAN, attorney for defendant, called as a witness on behalf of defendant testified as follows, without interrogatories:

Mr. COCHRAN.—I am Secretary of The San Francisco and Portland Steamship Company, and have been such since about August, 1918. I have been, however, since 1912, one of the attorneys for this company, and have handled its business in connection with these contracts, and the like, and am

(Testimony of Charles E. Cochran.)

acquainted with its relationship with the United States Shipping Board. I have in my hand a telegram having the purport of being dated October 12, 1917, from Washington, D. C., addressed to The San Francisco and Portland Steamship Company, signed by Bainbridge Colby, Commissioner. This telegram is a part of the records and files of The San Francisco and Portland Steamship Company, and I have been acquainted with it since the time of its receipt in 1917 till the present time. I offer the document in evidence, and ask to have it marked as Defendant's Exhibit "B," and would like to substitute copy and withdraw the original, so that the copy may have the same force and effect as the original.

Mr. WILSON.—I object to the offer on the ground that the telegram is irrelevant and immaterial to this controversy. I don't object to the fact that the telegram is not identified, if Mr. Cochran says it is the original telegram.

Mr. COCHRAN.—It is the original telegram.

COURT.—It will be admitted subject to your objection.

Exception saved.

(Marked Defendant's Exhibit "B.")

Mr. COCHRAN—(Reading:)

Defendant's Exhibit "B."

"Washington, D. C., October 12, 1917.

San Francisco & Portland SS Co.,

Pier 40, San Francisco, California. [98]

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled

under the laws of the United States that the requisition of all American steamers described below, and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon.

1. The ships affected by said requisition and included therein are (A) all cargo ships able to carry not less than 2,500 tons total dead weight, including bunkers, water and stores.

(B) All passenger steamers of not less than 2,500 tons gross register.

2. (A) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inland cargo and ship is put in ordinary good condition.

(B) As to steamers which have started to load their outward cargo requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (A) Owners whose steamers are operating in their regular trades are to continue the operations of their steamer for account of the government as they have been doing for themselves, until they received further instructions.

(B) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future [99] employment of said steamers. Acknowledge.

(Signed) BAINBRIDGE COLBY,
Commissioner."

Mr. COCHRAN.—Now, the steamer "Rose City" had a capacity of 2,800 tons dead weight, and the steamer "Beaver" was 2,500 tons dead weight. When that telegram was received, Mr. Blair, our general manager, turned the ships over to the Government, and began operating for the Government, pursuant to the last paragraph, pursuant to Paragraph 5-A of the telegram, directing owners whose steamers are operating in their regular trade to continue operation of their steamers for account of the Government as they have been doing for themselves, until they received further instructions. The steamers were thus operated until the month of January, 1918, when the United States Shipping Board and The San Francisco and Portland Steamship Company signed up a requisition.

Mr. WILSON.—I would like an objection and exception to all of this.

COURT.—Yes.

Mr. COCHRAN.—A requisition charter-party of which I have in my hand the originals. Each boat was made the subject of a requisition charter, and I would like to offer these charter-parties in evidence, substituting copies for the originals, and

withdrawing the originals, the copies to have the force and effect the originals would have.

Mr. WILSON.—I object to the offer on the ground that the same are immaterial and irrelevant to this controversy.

COURT.—Admitted subject to your objection.

Mr. COCHRAN.—I would like to have them marked respectively, that of the steamer "Beaver," "C," and that of the "Rose City," "D."

(Marked Defendant's Exhibits "C" and "D.")

Mr. COCHRAN.—The part of which to which I specially desire to direct your attention reads as follows: "This requisition charter made [100] and concluded upon in the District of Columbia the 14th day of January, 1918, between the San Francisco and Portland Steamship Company of Utah, owner of the good American single-screw steamship 'Beaver' of San Francisco, of 4507 tons gross register, and 2279 tons net register," etc. * * * "Witnesseth: Whereas, by requisition order dated October 12, 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, United States has requisitioned the use of the steamship 'Beaver' and the steamship has been delivered into the possession of the United States pursuant to the requisition; and

Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for the use of the steamship so requisi-

tioned, and to define by agreement the rights and duties of the United States, and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith;

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'Time Form' hereto annexed."

Now, on the second page of the charter-party is the time form, and the part I desire to refer to recites as follows:

"Whereas, the United States has determined to deliver possession of the vessel to the owner, to be operated by the owner for the United States";

And again, paragraph second on the same page which reads:

"The owner shall operate the vessel for the United States, shall provide and pay for all provisions," etc.

Now, when these documents were signed, they were signed by Mr. Farrell, the President of the Steamship Company. As a matter [101] of fact, they were signed a few days before the 14th of January, and then sent back to Washington, and then they were—these two returned, and have been in the files of the company ever since. I am acquainted with Mr. Farrell's signature, and the name here, J. D. Farrell, is his signature.

Now, the operations continued under that charter-

party, these charter-parties, that is, Exhibits "C" and "D," until the 29th day of May, 1918, when The San Francisco and Portland Steamship Company received from the Shipping Board the following telegram, which I desire to offer in evidence, and have marked and substitute a copy for the original, and withdraw the original, the copy to have the same force and effect as evidence as the original would have.

(Telegram marked Defendant's Exhibit "E" and read as follows:)

Defendant's Exhibit "E."

"Washington, D. C., May 24, 1918.

San Francisco & Portland Steamship Company,
Pier 40, San Francisco, California.

Five days' notice is hereby given of the cancellation of requisition charter on steamships 'Beaver' and 'Rose City' and that on and after May 29th the Shipping Board will be under no responsibility whatever with respect to such vessels.

UNITED STATES SHIPPING BOARD."

Mr. COCHRAN.—This was received by our general manager, according to the notation in the evening, 6:25 P. M. May 24th. I call your attention to paragraph third, page 1 of the charter-party, of these exhibits "C" and "D," which reads as follows:

"Third: Upon giving five days' written notice to the owner United States may at any time when the

vessel is in a United States port cancel this requisition charter without prejudice to the approved rights of either party." [102]

Now, when Defendant's Exhibit "E," the telegram from United States Shipping Board cancelling the requisition charter was received, the San Francisco and Portland Steamship Company was a little bit up in the air whether they were under Federal control or whether the company itself would have to operate it. The matter was taken up with Mr. C. R. Gray, director of the division of operation of the United States Railroad Administration, and finally he constituted his organization for the purpose of operating the boat—operating the "Rose City." The steamer "Beaver" having been in the meantime commandeered by the United Navy. So Mr. Gray wrote a letter to Mr. Farrell, President of the Oregon-Washington Railroad & Navigation Company, the original of which is in our files, but which I would like to retain in the files, and substitute a copy, and the document which I have and will ask to be marked is such copy, and I personally know that to be a copy.

Mr. WILSON.—Objected to as irrelevant and immaterial.

COURT.—Admit it subject to your objection.

Mr. WILSON.—Save an exception.

(Marked Defendant's Exhibit "F.")

Defendant's Exhibit "F."

"July 12, 1918.

President.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General.

Division of Operation,

C. R. GRAY, Director.

Interstate Commerce Building.

Washington.

At San Francisco, July 11, 1918.

Mr. J. D. Farrell,

President, Oregon-Washington Railroad & Navigation Company,

Portland, Oregon.

My dear Sir:

The operation of the ships and facilities of The San Francisco and Portland Steamship Company for the United States Railroad Administration will be placed under the jurisdiction of Mr. J. P. [103] O'Brien, General Manager, Oregon-Washington Railroad & Navigation Company.

Mr. G. L. Blair, as general manager of The San Francisco and Portland Steamship Company, will continue in charge of the same as general manager, reporting to Mr. O'Brien.

The Shipping Board have definitely decided that they will not charter the SS. Alvarado, but are favorably disposed towards chartering the SS. Blandon, and an effort is now being made by wire

to definitely charter this vessel for a two months' trial period on the bare boat basis, and if chartered, this boat will be turned over to Mr. Blair for freight operation between Portland and San Francisco.

Yours very truly,

(Signed) C. R. GRAY."

Mr. COCHRAN.—Now, the charter-parties, Defendant's Exhibits "C" and "D" make reference to the President's Executive Order of the 11th of July, 1917. I assume the Court will take judicial knowledge of that order, but for the purpose of refreshing the memory of the Court, it reads as follows:

"By virtue of authority vested in me in the section entitled 'Emergency Shipping Fund,' of an Act of Congress entitled 'An Act making Appropriation to supply Urgent Deficiencies in Appropriations for the Military and Naval Establishments on account of War Expenses for the Fiscal Year ending June 30 and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said Act in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable [104] to and in furtherance of the production, purchase, and requisitioning of materials and ship construction.

And I do further direct that United States Shipping Board shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to, and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels or parts thereof, or charters therein; and the operation, management and disposition of such vessels and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board, or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

(Signed) WOODROW WILSON.

The White House, 11 July, 1917."

It is Government Document No. 2664.

Mr. WILSON.—The San Francisco and Portland Steamship Company never canceled its tariff for shipments between San Francisco and Portland.

Mr. COCHRAN.—Well, I don't know, I am sure, but my understanding is that everything went right on as before.

Mr. WILSON.—The "Rose City" and "Beaver" continued to operate between San Francisco and Portland during this entire period?

Mr. COCHRAN.—Yes; there was no cessation of the movement of the boats.

Mr. WILSON.—And they continued to handle

shipments tendered to the agent at San Francisco, the same as before that time.

Mr. COCHRAN.—Yes, they did just as the telegram, this Exhibit "B" said to do, namely, to operate their regular trades—operate in their regular trades, and the company did continue the operation [105] of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.

Mr. WILSON.—And the company issued its own bills of lading?

Mr. COCHRAN.—Well, the form will show here. On these forms, now, it has been my observation throughout the Railroad Administration as well as the steamship operation, that the stationery, such as the forms of bills of lading, waybills, expense bills, and other forms in use in the handling of traffic, were used precisely the same after Government control as before Government control. But I don't consider that it made it a corporation contract because the Government used that form.

Defendant's Exhibits "C" and "D," being respectively charter-parties of the steamers "Rose City" and "Beaver" to United States Shipping Board, are hereto attached and made a part of this bill of exceptions.

Mr. COCHRAN.—I desire to request special findings in this case in favor of the defendant. I desire also a special finding if your Honor shall find for plaintiff in any amount, excluding all computation for damages in respect to all shipments which moved to Portland because it is not shown that on

the Portland shipments, either on the line or route outlined by the tariff, or by the line or route, or by any line geographically considered, that Portland is intermediate to North Portland. I urge this finding upon the grounds further, as stated in the demurrer to the complaint, and among which may be mentioned that this Court has no jurisdiction of the subject matter of this action. That jurisdiction is lodged solely in the Interstate Commerce Commission, and complaint in this case fails to state facts sufficient to constitute a cause of action. [106]

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the Court a request for findings and judgment in favor of the plaintiff in the manner following:

"This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been submitted by both parties, the Court being fully advised, does now make and find from the issue presented by the pleadings and the evidence offered the following

FINDINGS OF FACT.

I.

That from noon of December 28th, 1917, to midnight of February 29th, 1920, the United States Railroad Administration was in control of the line of steamboats and steamships between San Fran-

cisco, California, and Portland, Oregon, belonging to the San Francisco and Portland Steamship Company, and was operating the same as a common carrier in interstate commerce under the authority of the United States Director General of Railroads; that the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration and is authorized to represent it in the defense of this action.

That the Oregon-Washington Railroad & Navigation Company, pursuant to Section 5 of the Act of Congress known as the Act to Regulate Commerce as amended by the Act of Congress of August 24th, 1912, entitled "An Act to Provide for the Opening 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and [107] Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the San Francisco and Portland Steamship Company between San Francisco and Portland after the 1st day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad & Navigation Company was the owner of the stock of said San Francisco and Portland Steamship Company, and that said line was being operated in the interest of the public and was of advantage to the con-

venience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that the said Oregon-Washington Railroad & Navigation Company might continue the operation of said line subsequent to July 1st, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco and Portland Steamship Company to file with the Commission all of its tariffs, rules and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco and Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation Company its rates on sugar between San Francisco and North Portland, Oregon; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the San Francisco and Portland Steamship Company.

III.

That prior to taking control of said line of steamboats and steamships by the said United States Railroad Administration, said [108] San Francisco and Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company established and filed with the Interstate Commerce Commission a schedule of rates,

including a rate on sugar in carload lots of #30,000 minimum, from San Francisco to North Portland, and that the rate so established was continued in effect and adopted by the United States Railroad Administration during its operation of said line and the operation of the line of the Oregon-Washington Railroad & Navigation Company; that the rate on sugar in carload lots so published, filed and put in effect was twelve and one-half (12½¢) cents per hundred pounds at all times between noon of December 28th, 1917, and June 24th, 1918, inclusive; and was fifteen and one half (15½¢) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920; that the United States Railroad Administration carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all of the shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments so carried from and including the 29th day of December, 1917, to and including the 24th day of June, 1918, charged and collected for its transportation charges at the rate of fifteen (15¢) cents per hundred pounds; and on all shipments so shown on said exhibits from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920, charged and collected the sum of nineteen (19¢) cents per hundred

pounds; and in addition to such charges collected and received on all such shipments war tax at the rate of 3% of the freight charged.

IV.

That all of said charges at said rates were paid by the [109] plaintiff's assignors to the United States Railroad Administration; that the amount of the excess charges so collected by the United States Railroad Administration from the plaintiff's assignors between the 29th day of December, 1917, to and inclusive of the 24th day of June, 1918, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland was and is the sum of three thousand two hundred and 90/100 ($3,200.90) dollars; and the amount of such excess charges so collected by the United States Railroad Administration from and including the 25th day of June, 1918, to and including the 29th day of February, 1920, was and is in the sum of four thousand one hundred thirty-eight and 16/100 ($4,138.16) dollars.

V.

That Portland and Astoria, Oregon, are intermediate between San Francisco, California, and North Portland, Oregon, on the route established by the San Francisco and Portland Steamship Company in connection with the Oregon-Washington Railroad & Navigation Company, and continued in effect by the United States Railroad Administration for shipments of sugar between San Francisco and North Portland, and the United States Railroad Administration charged and collected on all of the

shipments to Portland and Astoria a greater sum than the rates established by it on shipments of sugar from San Francisco to North Portland, and that said shipments from San Francisco to Portland and Astoria moved over the same route in the same direction, and the haul from San Francisco to Portland and Astoria was included within the haul over the route so established from San Francisco to North Portland, said excess of charges so made being the amount shown in the preceding paragraph.

VI.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco and Portland Steamship [110] Company that it would at noon on October 15th, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco and Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," that thereafter formal charters were executed as of October 15th, 1917, covering the steamships "Beaver" and "Rose City," owned by the San Francisco and Portland Steamship Company, that on the 24th day of May, 1918, the United States Shipping Board notified the San Francisco and Portland Steamship Com-

pany as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships 'Beaver' and 'Rose City,' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VII.

That the United States Railroad Administration during all of the time from December 29th, 1917, to February 29th, 1920, on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, issued its bills of lading whereby it agreed to transport said sugar and collected from the plaintiff's assignors the charges for the transportation of said shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission at any time during said period, but at all times accepted shipments under said tariff and collected charges thereon.

VIII.

That the shippers who shipped said sugar over the line of the San Francisco and Portland Steamship Company operated by the United States Railroad Administration as listed on the exhibits attached to plaintiff's complaint and to the stipulation amending [111] plaintiff's complaint have each and all assigned their claims for the collection of said overcharges by the United States Railroad Administration from the said shippers to the plaintiff herein, and he is the lawful owner and holder thereof; that the sum of fifteen hundred $1500.00) dollars is a reasonable sum to allow the plaintiff

as attorney's fees for the collection of said overcharges, said attorney's fee to cover only the work with reference to said collection in this court and not on any appeal therefrom.

From the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from San Francisco, California, to Portland and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the United States Railroad Administration, having issued its bills of lading and collected the freigh charges on shipments between December 28th, 1917, and May 29th, 1918, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the San Francisco and Portland Steamship Company. [112]

III.

That the defendant is liable to the plaintiff for

the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of seven thousand, three hundred thirty-nine and 6/100 ($7,339.06) dollars together with interest at the rate of 6% per annum on the sum of three thousand two hundred and 90/100 ($3,200.90) dollars from the 25th day of June, 1918, and together with interest at the rate of 6% per annum on the sum of four thousand one hundred thirty-eight and 16/100 ($4,138.16) dollars from March 1st, 1920, and fifteen hundred ($1,500.00) dollars allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

THEREUPON Mr. Cochran, as attorney for defendant, submitted in writing to the Court the following objections to findings of fact and conclusions of law proposed and requested by the plaintiff.

Objections to Findings of Fact and Conclusions of Law.

"Comes now the defendant and objects and excepts to certain findings of fact and conclusions of law requested by the plaintiff in the manner following, that is to say:

I.

Defendant objects to Finding of Fact I in respect to the date from which the defendant began

operation of the steamships belonging to The San Francisco and Portland Steamship Company, for the [113] reason that the evidence discloses the defendant did not begin the operation of said boats until May 29th, 1918, and that in so far as said finding recites the defendant's operation to have been begun December 28th, 1917, the same for the period from that date to May 29th, 1918, is unsupported by the evidence.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

II.

Defendant objects to Finding of Fact II as proposed by plaintiff, alleging the same is immaterial to any issue in this case, and for further reason that the operations of The San Francisco and Portland Steamship Company and of the defendant in this case are not subject to the Act to Regulate Commerce, and are not made subject thereto by the Act of Congress of August 24th, 1912, entitled 'An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and Government of the Canal Zone,' commonly known s the 'Panama Canal Act.'

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

III.

Defendant objects and excepts to Finding of Fact III, alleging the same to be immaterial to any proper or legal issue in this case.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

IV.

Defendant objects and excepts to Finding of Fact IV, and alleges same is immaterial and that plaintiff is not entitled to [114] recover said moneys or any part thereof, and defendant further objects and excepts to that part of the finding which recites the defendant to have collected any freight between the 29th day of December, 1917, and the 29th day of May, 1918, for the reason that defendant was not during that period in control of the boats of The San Francisco and Portland Steamship Company, but that said control during that period was under the United States Shipping Board's Emergency Fleet Corporation.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

V.

Defendant objects and excepts to Finding of Fact V as proposed by plaintiff, for the reason the same is not supported by the evidence, particularly with respect to that portion of the finding which recites Portland as intermediate between San Francisco, California, and North Portland, Oregon, and further that The San Francisco and Portland Steamship Company did not establish any route either of itself or in connection with Oregon-

Washington Railroad & Navigation Company between San Francisco and North Portland by which Portland was intermediate.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VI.

Defendant objects and excepts to Finding of Fact VII, and alleges said finding of fact is unsupported by the evidence.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VII.

Defendant objects and excepts to Finding of Fact VIII, and [115] particularly to that part allowing attorney's fees for the collection of said overcharges, and avers that since there were no overcharges no attorney's fees can properly be allowed.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VIII.

Defendant objects and excepts to Conclusion of Law I to the effect that the charges collected from plaintiff's assignors were illegal and in violation of the amended fourth section of the Act to Regulate Commerce, and alleges a proper conclusion of law to be that defendant only collected charges on

sugar shipments in carload lots between the dates of May 29th, 1918, and February 29th, 1920, and only then at the proper, legal and valid tariff rates.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

IX.

Defendant objects to Conclusion of Law II, alleging same to be erroneous in all respects but particularly in respect to that period of time when the boats of The San Francisco and Portland Steamship Company were operated by The San Francisco and Portland Steamship Company as agent for the United States Shipping Board.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

X.

Defendant objects and excepts to Conclusion of Law III, alleging same to be erroneous.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was [116] duly allowed.

XI.

Defendant objects and excepts to Conclusion of Law IV, alleging same to be erroneous, and alleges further in support of said objection that the plaintiff is entitled to no judgment against defendant, and that his action should be dismissed.

The Court overruled said objection, to which

ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

XII.

Defendant objects generally to a judgment in favor of the plaintiff for any sum of money, and requests a judgment in favor of defendant for the reason that testimony properly supports such judgment.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

The Court thereupon signed the Findings of Fact and Conclusions of Law requested by plaintiff, and ordered same filed as the decision of the Court in said cause, to which ruling of the Court counsel for defendant excepted and exception was duly allowed.

WHEREUPON a judgment was entered in favor of the plaintiff and against the defendant as follows:

"This matter coming on, on application of the plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney James G. Wilson of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his [117] attorney, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises:

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C.

Davis, Agent of the United States Railroad Administration, judgment in the sum of Seven Thousand Three Hundred Thirty-nine and 6/100 ($7,339.06) Dollars, together with interest at the rate of 6% per annum on the sum of Three Thousand Two Hundred and 90/100 ($3,200.90) Dollars from the 25th day of June, 1918, and together with interest at the rate of 6% per annum on the sum of Four Thousand One Hundred Thirty-eight and 16/100 ($4,138.16) Dollars from March 1st, 1920, and Fifteen Hundred ($1500.00) Dollars allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of $18.61, and it is further adjudged and ordered that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 5th day of August, 1921."

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above-entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above-entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with

the rulings of the Court on the questions of law presented, and that the exceptions taken by the defendant therein were duly taken and allowed, and that said bill of [118] exceptions was duly prepared and submitted within the time allowed by the rules of this Court as extended by stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above-entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

Due and legal service of the within bill of exceptions prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 17th day of September, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 21, 1921. G. H. Marsh, Clerk.
[119]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [120]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Petition for Writ of Error.

James C. Davis, Agent United States Railroad Administration, defendant in the above-entitled action, conceiving himself aggrieved by the final order and judgment of this Court made and entered against him and in favor of the plaintiff on the fifth day of August, 1921, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto and the rulings of the Court thereon as set forth in his assignments of error filed herein, petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United

States Circuit Court of Appeals in the behalf made and provided;

And also that an order be made fixing the amount of security which the defendant shall give and furnish in said writ of error and that upon giving such security all further proceedings in the court be suspended and stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage [121] defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said United States Circuit Court of Appeals.

WHEREFORE defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of and that a transcript of the record of proceedings, papers, and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [122]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [123]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Assignments of Error.

Comes now the defendant above named, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorneys of record, and says that the judgment and final order of this Court, made and entered in the above-entitled court on the 5th day of August, 1921, in favor of the plaintiff above named and against the defendant, is erroneous and against the just rights of the defendant, and files

herein, together with his petition for writ of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint.

II.

The Court erred in admitting in evidence over the objection and exception of defendant the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company under the provision of section 5 of the Acts to Regulate Commerce as amended by the Panama Canal Act, in connection with the ownership of the San Francisco and Portland Steamship Company, said opinion being reported in 34 I. C. C. 165.

III.

The Court erred in overruling defendant's objection to Findings of Fact No. I, and in not sustaining said objection for the reasons therein stated. [124]

IV.

The Court erred in overruling defendant's objection to Findings of Fact No. II, and in not sustaining same and erred in holding that the Director General of Railroads and this defendant as agent in the operation of the boats of the San Francisco and Portland Steamship Company between the ports of San Francisco, California, and Portland, Oregon, was and is subject to the Act to Regulate

Commerce, and is made subject thereto by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and Government of the Canal Zone," commonly known as "The Panama Canal Act."

V.

The Court erred in overruling defendant's objection to Findings of Fact No. III, and in not sustaining the same.

VI.

The Court erred in overruling defendant's objection to Findings of Fact No. IV, and in not sustaining the same, and particularly did the Court err in holding defendant to have collected freight charges between the 29th day of December, 1917, and the 29th day of May, 1918, because as defendant alleges said vessels were under the control of the United States Shipping Board's Emergency Fleet Corporation.

VII.

The Court erred in overruling and in not sustaining defendant's objection to Finding of Fact No. VII.

VIII.

The Court erred in overruling and in not sustaining defendant's objection to Findings of Fact No. VII. [125]

IX.

The Court erred in overruling and in not sustaining defendant's objection to Findings of Fact No. VIII.

X.

The Court erred in overruling defendant's objection to Conclusions of Law No. I, and erred in not concluding that defendant collected only the lawful, valid, and proper tariff rates on the sugar carried between the dates of May 29, 1918, and February 29, 1920.

XI.

The Court erred in overruling defendant's objection to Conclusions of Law No. II, particularly with respect to that period of time when the vessels of the San Francisco and Portland Steamship Company were operated by said company as agent for the United States Shipping Board.

XII.

The Court erred in overruling and in not sustaining defendant's objection to Conclusions of Law No. III.

XIII.

The Court erred in overuling and in not sustaining defendant's objection to Conclusions of Law No. IV, and in entering judgment in favor of the plaintiff against defendant, which judgment should have been in favor of defendant that plaintiff's action be dismissed.

XIV.

The Court erred in overruling defendant's objection to a judgment in favor of plaintiff for any sum of money and in not granting defendant's request for judgment in favor of defendant for the reason that the testimony properly supports such judgment. [126]

XV.

The Court erred in overruling defendant's request for special findings in this case in favor of the defendant and in not giving judgment in favor of the defendant for the dismissal of plaintiff's complaint.

XVI.

The Court erred in holding and in finding that the charges collected by defendant from the plaintiff's assignors for the transportion of sugar in carload lots from San Francisco, California, to Portland, and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce, to the extent that same exceeded rates established and in effect from San Francisco, California, to North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad and Navigation Company at the time of the movement of the respective shipments, and in not concluding as a matter of law as requested by defendant that such charges were lawfully assessed and collected pursuant to valid tariffs.

XVII.

The Court erred in entering judgment in favor of plaintiff against defendant for the sum of seven thousand three hundred and thirty-nine 6/100 dollars ($7,339.06), with interest at the rate of six per cent per annum on three thousand two hundred and 90/100 dollars ($3,200.90) thereof from the 25th day of June, 1918, and upon four thousand one hundred and thirty-eight and 16/100 dollars ($4,138.16) from March 1, 1920, and also the sum of fifteen hundred

dollars (1500.00) as attorney's fees, and likewise erred in refusing and declining to enter judgment in favor of defendant.

WHEREFORE the said defendant and plaintiff in error prays that said judgment of the District Court be reversed, [127] with directions to District Court to enter a judgment in favor of the defendant.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27th, A. D. 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [128]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was filed in said court a praecipe for transcript, in words and figures as follows, to wit: [129]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES G. DAVIS, Agent, United States Railroad Administration,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein and include in said transcript the following proceedings, papers, records, and files, to wit:

1. The plaintiff's complaint with amendments and supplemental demands.
2. Defendant's demurrer.
3. Answer.
4. Reply.
5. Bill of exceptions and certificate omitting exhibits attached thereto.
6. Judgment.
7. Petition for writ of error.
8. Assignments of error.
9. Order allowing writ of error and fixing bond.
10. Supersedeas bond and bond for costs.
11. Writ of error.
12. Citation on writ of error. [130]
13. Stipulation as to printing record.
14. This praecipe and any and all records, entries, orders, papers, proceedings, and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the

United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [131]

AND AFTERWARDS, to wit, on Wednesday, the 28th day of September, 1921, the same being the 75th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [132]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Order Allowing Writ of Error.

This 28th day of September, 1921, came the defendant above named, James C. Davis, Agent, United States Railroad Administration, appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys, and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this Court, made and entered on the 5th day of August, 1921, in favor of the plaintiff above named and against said defendant and the findings of fact and conclusions of law made or refused on the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings of this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration thereof, this Court does allow said writ of error upon said defendant filing with [133] the clerk of this court a good and sufficient bond in the sum of $10,000.00, to the effect that if said defendant, James C. Davis, Agent, United States Railroad Administration, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void; otherwise to remain in full force and virtue, the said bond to be approved by the Court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 28th day of September, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [134]

AND AFTERWARDS, to wit, on the 28th day of September, 1921, there was duly filed in said court, a bond on writ of error, in words and figures as follows, to wit: [135]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that James C. Davis, Agent, United States Railroad Administration, principal, and National Surety Company of New York, a corporation, surety, are hereby and firmly bound unto A. J. Parrington, the above-named plaintiff in the sum of $10,000.00, to be paid to the said A. J. Parrington, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated the 27th day of September, 1921.

WHEREAS, the above-named James C. Davis is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 5th day of August, 1921:

Now, the condition of this obligation is such that if the above-named James C. Davis, as agent, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good this plea, then this obligation to be void; otherwise to be and remain in full force and effect.

JAMES C. DAVIS,
Agent, United States Railroad Administration.
By C. E. COCHRAN,
One of His Attorneys.

THE NATIONAL SURETY COMPANY OF NEW YORK.
By E. P. WELCH,
Resident Vice-President.

[Seal] Attest: D. E. GORTON,
Resident Assistant Secretary. [135½]

Countersigned at Portland, Oregon, this 27th day of September, 1921.

E. P. WELCH,
Resident Agent.

Examined and approved this 28th day of September, 1921.

R. S. BEAN,
District Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [136]

AND AFTERWARDS, to wit, on the 3d day of October, 1921, there was duly filed in said court a stipulation as to transcript of record, in words and figures as follows, to wit: [137]

In the District Court of the United States for the District of Oregon.

L.—8747.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Stipulation as to Transcript of Record.

It is stipulated and agreed by and between counsel for the respective parties to this cause that in preparing a certified copy of the record, the clerk of this court may omit the preparation of copies of the original exhibits physically attached to the bill of exceptions and except such exhibits from the effect of his certificate.

Dated at Portland, Oregon, this 27th day of September, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Filed October 3, 1921. G. H. Marsh, Clerk. [138]

AND AFTERWARDS, to wit, on the 28th day of October, 1921, there was duly filed in said court a stipulation relative to exhibits, in words and figures as follows, to wit: [139]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration.

Stipulation Re Original Exhibits.

WHEREAS, Defendant's Exhibit "C" and "D" in the above-entitled action consist of a Requisition Charter respectively of the Steamers "Beaver" and "Rose City" owned by the San Francisco & Portland Steamship Company, but the subject of charter to the United States Shipping Board; and

WHEREAS, said exhibits are in words and figures the same except Exhibit "C" is for the Steamer "Beaver" and Exhibit "D" is for the Steamer "Rose City"; and

WHEREAS, the above-entitled action was consolidated for trial with the action of A. J. Parrington vs. The San Francisco & Portland Steamship Company, which case also is being taken to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, it is stipulated and agreed by and between counsel for the respective parties that Defendant's Exhibit "C" may be attached to and made a part of the bill of exceptions and that same may serve also as defendant's Exhibit "D" as well, so that Exhibit "D" may be attached to the bill of exceptions in the case of A. J. Parrington vs. The San Francisco & Portland Steamship Company.

Dated at Portland, Oregon, this 26th day of October, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.
C. E. COCHRAN,
Attorney for Defendant.

Filed October 28, 1921. G. H. Marsh, Clerk. [140]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 140, inclusive, constitute the transcript of record upon writ of error in the cause in said court in which A. J. Parrington is plaintiff and defendant in error and James C. Davis, Agent,

United States Railroad Administration, is defendant and plaintiff in error; that said transcript has been prepared by me in accordance with the praecipe filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record annexed thereto the original writ of error and the original citation filed in said cause.

I further certify that the cost of the foregoing transcript of record is $49.35 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 7th day of October, 1921.

[Seal] G. H. MARSH,
Clerk. [141]

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court of the District of Oregon.

Filed November 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

L.—8747.

October 25, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Order Enlarging Time to and Including November 15, 1921, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to November 15, 1921.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Nov. 15, 1921, to File Record and Docket Cause. Filed Oct. 28, 1921. F. D. Monckton, Clerk. Refiled Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Stipulation Re Omission of Exhibits Attached to Complaint.

It is stipulated and agreed by and between counsel for the respective parties that in printing the record of the above-entitled action the Clerk of the Circuit Court of Appeals may omit the following documents constituting exhibits attached to the complaint:

"A" on page 18 of the transcript.
"B" on page 19 of the transcript.
"C" on pages 20 and 21 of the transcript.
"D" on pages 22 and 23 of the transcript.
"E" on page 24 of the transcript.

"F" on page 25 of the transcript.
"G" on page 26 of the transcript.
"H" on page 27 of the transcript.
"I" on page 28 of the transcript.
"J" on page 29 of the transcript.
"K" on page 30 of the transcript.
"L" on page 31 of the transcript.
"M" on page 32 of the transcript.
"N" on page 33 of the transcript.
"O," "P" and "Q" on page 34 of the transcript.

—and also the following for supplemental exhibits:

Supplementary Exhibit "R" (Allen & Lewis) on page 50 of the transcript.

Supplementary Exhibit "S" (Allen & Lewis) on page 51 of the transcript.

—and in lieu thereof print this stipulation instead:

Said exhibits present among other things the following typical claims:

(A) Freight Bill No. 21; Way Bill Date 1-2-1918; No. 33; Consignor California & Hawaiian Sugar Refining Co.; Ship "Beaver," Voyage 185; Weight 30,740; Rate 15¢ Freight including War Tax $47.9; Date paid 1-8-1918; Overcharge claimed $7.91.

The amount of the claims of which (A) is typical is $7,339.06. Of the claims of which (A) is typical there are a substantial number arising from shipments originating during the period between January 1, 1918, and May 29, 1918, the amount of which may be determined by computation based upon the aforesaid exhibits.

Dated at Portland, Oregon, this 9th day of November, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Ore., ——, 1921.

————————————,
Attorney for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Stipulation. Filed November, 1921. ————————, Clerk.

No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed December 13, 1921. F. D. Monckton, Clerk.

No. 3799

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. L–8723.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

Stipulation for Consolidation of Causes for Trial.

IT IS STIPULATED AND AGREED between counsel for the respective parties to the above causes

of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First: That the above-entitled three causes of action may be consolidated for trial in the above-entitled court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second: That the transcript of record in the case of James C. Davis, Director General, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, docketed and filed in this court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L–8723, James C. Davis, Agent, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, and the decision of said case shall not follow the order in the other two cases above mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L–8723.

Dated at Portland, Oregon, this 9th day of January, 1922.

C. E. COCHRAN,
Of Counsel for Plaintiffs in Error.
JAMES G. WILSON,
Counsel for Defendant in Error.

Dated: San Francisco, California, January 11, 1922.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Stipulation for Consolidation of Causes for Trial. Filed Jan. 11, 1922. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and

that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis, etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent,
Plaintiff in Error,
vs.
THE PORTLAND SEED COMPANY,
Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writs of Error to the District Court of the United States for the District of Oregon.

Before ROSS, MORROW and HUNT, Circuit Judges.

On writs of error to review judgments in favor of shippers for recovery of excess charges by carriers.

PARRINGTON'S CASES.

HUNT, Circuit Judge:

These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916,

the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a minimum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods mentioned the rate as per Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June 25, 1918 was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

THE SEED COMPANY CASE.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Huntington, Oregon, thence by Oregon-Washington Railroad and Navigation lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant than Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in

violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the joint rate via the rail and water line. The accuracy of this reasoning depends upon whether the case is to be considered in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving

the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the Court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.'" (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn.

R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co. vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however, point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co. vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it was unnecessary to apply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for

a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and that neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words "or route," it called for a new, and we believe, a broader interpretation by which the word "route" is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R., —— U. S. ——, Feb. 27, 1922.) We have here too the circumstance that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as *amicus curiae* it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken

from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the contrary intent is to be gathered from the provision of section 206 (a) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose." There is also a further provision that such action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted carriers to violate the

long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as *amicus curiae* has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robinson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of a decision of the Interstate Commerce Commission which was not mentioned in the pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increases in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth

dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other than at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years after the cause of action has accrued and not after. Prior to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Western R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Com-

mission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R. Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North

Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respects the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that court as attorneys' fees, fees for conducting the cases in this court are also allowed. (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862.) A reasonable fee in case #3799 in this court is $600; in case #3800, $1000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[Endorsed]: Opinion. Filed Jun. 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable ERSKINE M. ROSS, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

3828.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

Order of Submission.

ORDERED leave granted Mr. Ben C. Dey, to appear as *amicus curiae;*

FURTHER ORDERED above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as *amicus curiae,* and by Mr. James G. Wilson, counsel for the defendant in error in each of the above-entitled causes, and submitted to the Court for consideration and decision, with leave to Mr. Dey to file a brief as *amicus curiae* within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error.

vs.

A. J. PARRINGTON,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorneys' fee in the sum of $600.00 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered June 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Order Staying Issuance of Mandate, etc.

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED mandate of this court in the above-entitled cause stayed to and including August 31, 1922, for the purpose of enabling said counsel to perfect a writ of error from the Supreme Court of the United States to the above-entitled court.

Dated: San Francisco, California, June 17, 1922.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed June 17, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Petition for Writ of Error.

Your petitioner, James C. Davis, Agent, United States Railroad Administration, plaintiff in error in the above-entitled action, respectfully shows:

That said action is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that judgment has been therein rendered on the 5th day of June, 1922, affirming the judgment of the District Court of the United States, for the District of Oregon.

The matter in said action exceeds One Thousand Dollars, besides costs, and the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the action or controversy, being aliens or citizens of the United States, or citizens of the different states; this action does not arise under the patent laws, nor the revenue laws, nor the criminal laws, nor is it an admiralty cause, but is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

This petitioner therefore respectfully prays that a writ of error be allowed it in the above-entitled action, directing the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, to send the record and proceedings in said action, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Plaintiff in Error,
By ARTHUR C. SPENCER,
C. E. COCHRAN,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for upon the plaintiff in error giving bond according to law, in the sum of Ten Thousand ($10,000.00) Dollars.

W. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, July 31, 1922.

WILSON & GUTHRIE,
Attorneys for Deft. in Error.

[Endorsed]: Petition for Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error by Arthur C. Spencer and Charles E. Cochran, his attorneys, and says:

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals, for the Ninth District, in the above-entitled cause and in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Seven Thousand Three Hundred Thirty-nine and Six One-hundredths ($7339.06) Dollars with interest as in said judgment stated, and the further sum of Fifteen Hundred ($1500.00) Dollars as attorney's fees in the District Court, and the further sum of Six Hundred ($600.00) Dollars at-

torney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the fifth day of June, 1922 in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint.

(b) Assignment of Error Number Ten charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates.

(c) Assignment of Error Number Twelve where-

in error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

(d) Assignment of Error Number Thirteen wherein error was charged in entering judgment in favor of the defendant in error and against the plaintiff in error and in not dismissing the complaint.

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206C of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below because:

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against the plaintiff in error.

WHEREFORE, the said James C. Davis, Agent, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States District Court for the District of Oregon as affirmed by the judgment of the United States Circuit Court of Appeals be reversed, annulled and esteemed for naught, and that said cause be remanded to the United States District Court for the District of Oregon with instructions to grant a new trial in said cause, and upon such trial to dismiss the complaint, and for such further proceedings in said cause as may be determined upon by our Supreme

Court to the end that justice may be done in the premises.

ARTHUR C. SPENCER,
C. E. COCHRAN,
Attorneys for Plaintiff in Error.

Service by copy admitted at Portland, Oregon, July 31, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

[Endorsed]: Assignment of Errors on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Order Allowing Writ of Error and Fixing Amount of Bond.

Based upon the petition of the plaintiff in error, together with certain assignments of error intended to be urged by it within due time, it is

ORDERED that a writ of error issue upon said plaintiff in error filing a bond with the Clerk of

this Court in the sum of Fifteen Thousand ($15,000.00) Dollars, said bond to operate as a supersedeas.

IT IS FURTHER ORDERED that the bond presented by the said petitioner be, and the same is hereby approved.

WM. H. HUNT,
Circuit Judge.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, James C. Davis, Agent United States Railroad Administration, as principal, and National Surety Company, as surety, are held and firmly bound unto A. J. Parrington, in the full and just sum of Ten Thousand ($10,000.00) Dollars to be paid to the said A. J. Parrington, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 20 day of July, 1922.

Whereas, lately at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, in an action depending in said court, between James C. Davis, Agent United States Railroad Administration, plaintiff in error, and A. J. Parrington, defendant in error, a judgment was rendered against the said James C. Davis, Agent, United States Railroad Administration, and the said James C. Davis, Agent United States Railroad Administration having obtained a writ of error and filed a copy thereof in the clerk's office of said United States Circuit Court of Appeals, to reverse the judgment in the aforesaid action, and a citation directed to the said A. J. Parrington citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 2d day of October, 1922.

Now, the condition of the above obligation is such, that if the said James C. Davis, Agent United States Railroad Administration shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JAMES C. DAVIS,
Agent United States Railroad Administration.
By C. E. COCHRAN,
One of His Attorneys.

[Seal] NATIONAL SURETY COMPANY OF NEW YORK,
By H. C. LEIGH,
Attorney in Fact.

Countersigned at Portland, Oregon, this 21st day of July, 1922.

D. E. GORTON,
Resident Agent.

Examined and approved this 2d day of August, 1922.

WM. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, this 31st day of July, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Form and amount approved.

WILSON & GUTHRIE.

[Endorsed]: Bond on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixty-four (164) pages, numbered from and including 1 to and including 164, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on writ of error from the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the plaintiff in error, as the originals thereof remain on file

and appear of record in my office, as well as the following original exhibits:

Plaintiff's Exhibits Nos. 3, 4 (2 exhibits), 5 (2 exhibits, and 7;

Defendant's Exhibits Nos. "A" and 5,

and that the same constitutes the transcript of record upon writ of error from the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of August, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the United States.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between James C. Davis, Agent United States Railroad Administration, plaintiff in error, and A. J. Parrington, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court

at Washington within sixty days from the date hereof; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, 1922.

[Seal] F. D. MONCKTON,
Clerk of the Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy.

Allowed by:

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 29th day of August, A. D. 1922,

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT,

[Seal] By F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, U. S. Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed Aug. 18, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States to A. J. Parrington, Defendant in Error, GREETING:

You are hereby cited and admonished to be and

appear before the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein James C. Davis, Agent United States Railroad Administration, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the Circuit Court of Appeals for the Ninth Circuit, this 18th day of August, in the year of our Lord, one thousand nine hundred and twenty-two.

WM. H. HUNT,
Judge, United States Circuit Court of Appeals for the Ninth Circuit.

Copy of writ served on us this 21st day of August, 1922.

JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Or., August 21st, 1922.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 3799. In the Supreme Court of the United States. James C. Davis, Agent United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. Filed Aug. 23, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

Office Supreme Court, U. S.
FILED
MAR 17 1924
WM. R. STANSBURY
CLERK

No. 123.

In the Supreme Court of the United States.

JAMES C. DAVIS, AGENT, UNITED STATES RAILROAD ADMINISTRATION, PLAINTIFF IN ERROR,

v.

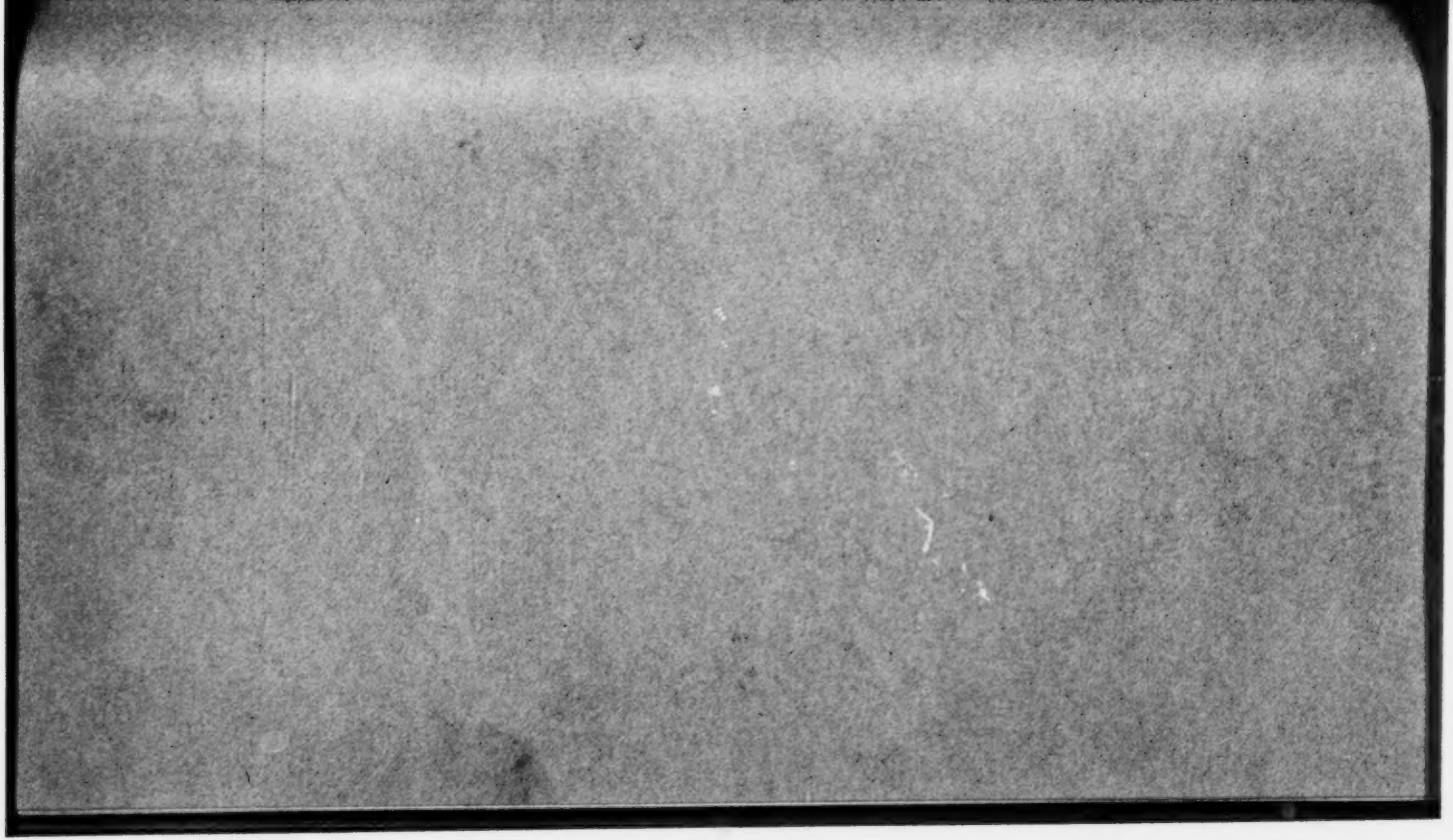
A. J. PARRINGTON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR FOR "AN ORDER TO RECONSIDER THE RULE ANNOUNCED IN KANSAS CITY SOUTHERN v. WOLF, 43 S. C. R. 259, WITH REFERENCE TO THE LIMITATION OF ACTIONS IN VIEW OF SUBSEQUENT LEGISLATION OF CONGRESS AND TO RECEIVE AND CONSIDER THE ACCOMPANYING ARGUMENT ON SAID RECONSIDERATION."

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Plaintiff in Error.

WASHINGTON, D. C., *March 17, 1924.*

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924



In the Supreme Court of the United States.

JAMES C. DAVIS, AGENT, UNITED STATES Railroad Administration, plaintiff in error,

v.

A. J. PARRINGTON, DEFENDANT IN ERROR.

No. 123.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR FOR "AN ORDER TO RECONSIDER THE RULE ANNOUNCED IN KANSAS CITY SOUTHERN v. WOLF, 43 S. C. R. 259, WITH REFERENCE TO THE LIMITATION OF ACTIONS IN VIEW OF SUBSEQUENT LEGISLATION OF CONGRESS AND TO RECEIVE AND CONSIDER THE ACCOMPANYING ARGUMENT ON SAID RECONSIDERATION."

The plaintiff in error understands that the motion of the Defendant in error is not for reconsideration of the *Wolf case*, 261 U. S. 133, itself, but is limited to a motion for reconsideration of the validity of the rule of limitation of actions announced in that case in view of subsequent legislation. For convenience the plaintiff in error will hereinafter be referred to as the Director General.[1]

[1] The actual plaintiff in error is the Agent of the President, designated by the President as required by the provisions of Section 206 (a) of the Transportation Act of 1920, as the Agent against whom suit may be brought under the provisions of that section. The President, however, designated as such Agent, the Director General of Railroads, who, nevertheless, is not subject to suit as such, but only as Agent of the President.

On this understanding and, moreover, in view of this court's refusal to reconsider its decision in the *Wolf case*, the Director General will not, at this time, argue the question of the validity of that decision. It will be assumed that the decision is controlling here unless subsequent legislation has since invalidated it.

The defendant in error, as shown by its motion and argument in support thereof, urges that the Wolf decision has been invalidated by Section 206 (*a*) and Section 206 (*c*) of the Transportation Act of 1920, and by the amendment of Section 16 of the Interstate Commerce Act by the Transportation Act. The sections referred to are printed in the argument of the defendant in error, but for convenience are likewise appended to this brief.

So far as the amendment to Section 16 of the Interstate Commerce Act is concerned, it will suffice to say that the applicability of that amendment to the Director General is before this court in the case of *E. I. Dupont de Nemours & Company* v. *James C. Davis, Director General*, No. 517, October Term, 1923, and will doubtless be argued and disposed of before the motion of the defendant in error herein can be considered.

So far as Section 206 (*a*) is concerned, the whole argument of the defendant in error that that section extends the time for bringing actions in court against the Agent of the President, in any event, for the period of two years after the passage of the Trans-

portation Act, depends on the unwarranted assumption stated on page 8 of its brief that—

> there is no Federal or statutory period of limitation prescribed for the commencement of actions in court under Sections 8 and 9 of the Act to Regulate Commerce.

This assumption is in direct conflict with the construction placed by this court upon those sections in the Act to Regulate Commerce in the Wolf case, that is, that that Act requires suit to be brought within two years after the accrual of the cause of action.

This being so, the construction placed upon Section 206 (*a*) by this court itself in the case of *Leigh Ellis & Company* v. *Davis, Agent*, 43 Supreme Court Reporter 243, is conclusive against the contention of the defendant in error that that section extended the time for bringing suit beyond the period of action prescribed by the Interstate Commerce Act as construed by the decision of this court in the *Wolf case*, that is, within two years after the cause of action accrued. In the *Leigh Ellis case* this court said:

> The contention is supported with some ingenuity, but we think it enough to observe that *the general purpose was to limit, not to extend, rights of action*, and that we can not suppose that it was extended to invalidate existing contracts good when made.

In other words, since the Act to Regulate Commerce as prescribed in the Wolf case did prescribe a limitation of two years from the accrual of the cause of action for the bringing of action against a carrier

under that Act, that limitation applies to actions against the Presidential Agent under the decision of this court in the Leigh Ellis case, since as this court said in that case:

> The general purpose of Section 206 (*a*) was to limit, not to extend, rights of action.

It follows that taking the decision in the *Wolf case* in connection with the decision in the *Leigh Ellis case*, that this suit was not brought as provided by Section 206 (*a*)—

> within the periods of limitation now prescribed by State or Federal statutes

except as to such shipments as moved within two years prior to February 12, 1921.

So far as Section 206 (*c*) is concerned, the defendant in error is in the paradoxical position of contending for the right to maintain this suit in court under the provisions of Section 206 (*a*) without preliminary complaint to the Interstate Commerce Commission, while at the same time claiming the benefit of the period of limitation allowed by Section 206 (*c*) solely for the filing of complaints with the Interstate Commerce Commission.

The Director General concedes that Section 206 (*c*), unlike Section 206 (*a*), does not limit but extends the period of limitation previously provided by the Act to Regulate Commerce, but this extension is confined to the filing of complaints with the Interstate Commerce Commission. Moreover, the Director General has contended, in his brief previously

filed herein, that Section 206 (*a*) does not apply to a claim for damages against the Presidential Agent for violation of the Fourth Section, or of any section of the Interstate Commerce Act, so as to permit a suit to be filed originally in court, but that such a claim being for the collection of a rate "otherwise in violation of the Interstate Commerce Act," must under the specific provisions of Section 206 (*c*) be filed with the Interstate Commerce Commission. It is true that on argument, Counsel for the Director General conceded that suits for violation of the Fourth Section could be brought in court without preliminary complaint to the Interstate Commerce Commission. Because of lack of time, however, Counsel did not argue the further question whether such suits could be so brought against the Presidential Agent, nor would such an argument have been strictly germane since it was the Director General's principal and ultimate contention that the Fourth Section could have no application whatever to him.

It does not, therefore, seem appropriate for the Director General, in connection with this discussion purely of the question of limitations of actions, to discuss further the question whether any action at all will lie against him under Section 206 (*a*) for a violation of the Fourth Section, or whether as against him, as distinguished from a carrier, the remedy for such a violation is ~~co~~nclusively by complaint to the Interstate Commerce Commission under Section 206 (*c*). It will suffice to say in this re[illegible]pect that if Section 206

(*c*) does apply, the defendant in error is out of court, and if it does not, the limitation period provided by it is irrelevant to this suit under Section 206 (*a*).

It is obvious, therefore, that the validity of the *Wolf case* has not been affected, so far as the Director General or the Presidential Agent is concerned, by any subsequent legislation, and particularly by anything in Section 206 (*a*) or Section 206 (*c*) of the Transportation Act, or the amendment to Section 16 of the Interstate Commerce Act.

On the other hand, if this court should desire to reconsider the validity of the decision in the *Wolf case*, itself, irrespective of subsequent legislation, the Director General would, of course, desire an opportunity to present his views in this connection.

Respectfully submitted.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Plaintiff in Error.

WASHINGTON, D. C., *March 17, 1923.*

APPENDIX.

TRANSPORTATION ACT, 1920.

SECTION 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

SECTION 206. (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection of enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be

filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

AMENDMENT TO SECTION 206 (A) AND SECTION 206 (C), FEBRUARY 24, 1922.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subdivision (a) of section 206 of the Transportation Act, 1920, be, and the same hereby is, amended by striking out the period at the end thereof, substituting a semicolon, and adding the following: "except that actions to enforce awards made by the commission under the provisions of subdivision (c) against the agent so designated by the President may be brought within one year after the date of the commission's award."

SECTION 2. That subdivision (c) of said section 206 be, and the same hereby is, amended to read as follows:

"(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of

rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic), which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year, or, if so claimed in respect of overcharges above the legal tariff charge, within two years and six months, after the termination of Federal control, against the agent designated by the President, under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon by the agent designated by the President under subdivision (a)."

Section 16 (3) Interstate Commerce Act as Amended by Transportation Act, 1920.

(3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after.

○

FEB 12 1924
WM. R. STANSBU
CLERK

No. 128

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent of the President and Director General of Railroads,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

JAMES G. WILSON,
508 Platt Building,
Portland, Oregon,
Attorney for Defendant in Error.

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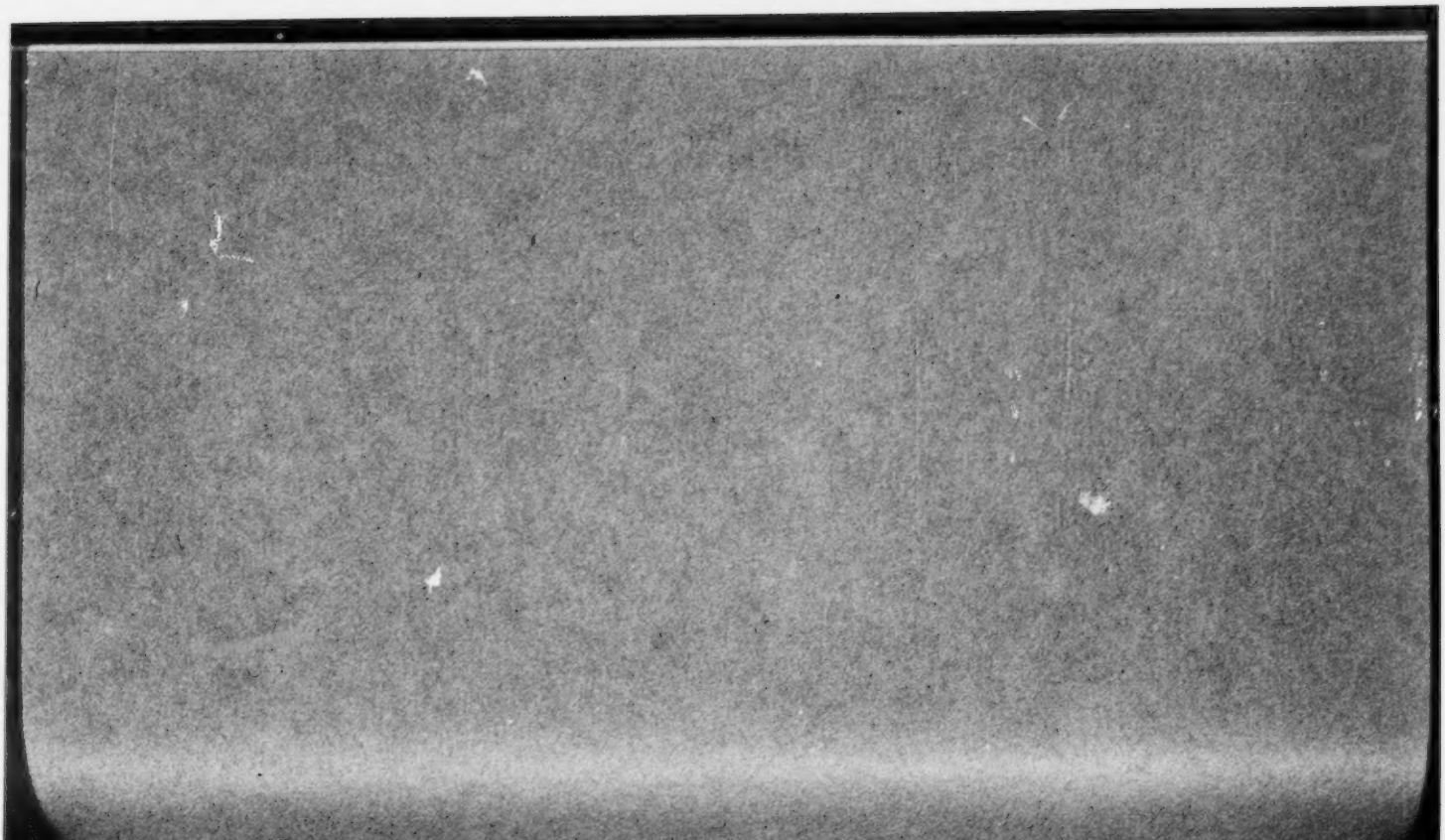

No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent of the President and Director General of Railroads,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

The Railroad Administration's assistant general counsel on behalf of plaintiff in error has filed a supplemental brief herein of 82 pages, discussing in great detail generally his ideas of the construction of the long and short haul clause of the 4th Section of the Act, and maintaining that no violation of the Act has been shown because there was no proof of shipments between the more distant points to which the lesser rate applied, and also maintaining that the Director General was not sub-

ject to the 4th Section of the Act to Regulate Commerce.

We will not attempt to discuss every particular angle of the attorney's discussion, as we will attempt to point out that the subjects which he discusses are in fact determined by the interpretation which this Court has already placed upon the 4th Section. It will be noted that the greater portion of counsel's supplemental brief is devoted to an attempt to secure an interpretation of the 4th Section to the effect that the mere publication of a lesser rate to the more distant point does not constitute a violation of the Interstate Commerce law, and that the higher rate to the intermediate point when published in the tariffs remains the only lawfully published rate to the intermediate point and must be charged notwithstanding the law says that no such charge shall be made and that no violation of the long and short clause of the 4th Section can exist until it is actually proven that shipments have been made to the more distant point at the lesser rate. It should also be noted that counsel's argument concedes that for any carrier other than the Director General when a shipment has in fact been shown to have been made to the more distant point it has violated the long and short haul clause and renders itself immediately liable to damages and to the criminal penalty, and that the measure of the damages is the difference in the rate charged to the intermediate point and the lesser rate charged to the more distant point, the latter concession being

diametrically opposed to the contention of counsel in the Director General's opening brief.

This interpretation of the long and short haul clause is diametrically opposed to the interpretation of the 4th Section by this Court in United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, pointed out and referred to in our former brief. To our mind, the decision in that case answers every phase of the discussion of the 4th Section contained in the supplemental brief, and the contention of the assistant general counsel of the Railroad Administration can only be sustained on the basis of the incorrectness of that decision. The 4th Section made it absolutely unlawful to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for the longer distance over the same line or route in the same direction, the shorter being included within the longer distance. The first proviso provided that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less than for the shorter distances. The second provisio reads: "Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act *shall be required to be changed* by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this

Section until a determination of such application by the Commission." In the Louisville & Nashville case this Court interprets the prohibition of the section in connection with the provision as to no rates being required to be changed within six months, as absolutely prohibiting the existence of such rates after the expiration of that time, if at that time no application had been filed with the Commission to continue the same.

The language of this Court, speaking through the late Chief Justice White (235 U. S. Page 323), is: * * * "And for the purpose of making the prohibition efficacious, it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted" * * * The proviso that no changes were required to be made in the *rates or charges* lawfully existing until a certain time and on a certain contingency, taken in connection with the absolute prohibition of the section against that character of charges can certainly only be interpreted as absolutely prohibiting the existence of any such rates after the expiration of the time where no application had been made to continue them, and to require a change in any theretofore lawfully existing rate or charge of that character. Under the interpretation contended for by counsel in the supplemental brief there would have been no requirement on the part of the carrier to have changed a single rate, and such rates could have gone on forever, or until such time as someone had shipped to the

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

Under counsel's contention, if a carrier should apply to the Commission for permission to charge less to the more distant point than to the intermediate point, and the Commission should deny the application, the carrier could go on charging the higher rate to the intermediate point without any penalty or without violating the section until there had been a shipment to the more distant point.

To our mind this contention is absurd. To illustrate, after the denial of the application by the Commission, the carrier could continue its rates on a higher basis to the intermediate point and if a shipment to the intermediate higher rate point is made, say on January 1st, there would be no violation of the Act and consequently no recovery. On January 3rd a shipment occurs to the more distant point at the lesser rate. There is still no violation of the Act as to the shipment on

January 1st, because at the time it was made there had been no shipment to the further point. On January 5th, however, another shipment is made to the intermediate point at the higher rate, but this is illegal because on January 3rd there had been a shipment to the further point at a less rate, and this notwithstanding there had been an order prior to any of the shipments denying to the carrier the right to charge more to the intermediate point.

It seems to us that no such possible interpretation of the Act can be made.

The higher charge to the intermediate point in the present case was made first on May 10th, 1916. Prior to that date the rates to both Portland and North Portland were the same, to-wit, 12½ cents (Tr. Pp. 58 and 60), so that subsequent to the expiration of six months from June 18, 1910, the date of the amendment of the 4th Section, the rates to Portland and North Portland were on the same basis. On May 10, 1916, however, the rate to Portland, the intermediate point, was raised to 15 cents without any change in the rate to North Portland, and without any application to or authorization by the Interstate Commerce Commission.

The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

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The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and

charges into effect by filing and publication for a period of thirty days before such charges become effective. The public is bound to take notice of such filing and publication and any rates or charges established cannot be changed except by special permission without thirty days publication of such change. The higher charge to an intermediate point cannot be made without previous authority of the Commission after investigation, and the authorization of such higher charge must necessarily have preceded the filing of the tariffs.

The only reasonable interpretation therefore which can be placed upon the amendment of the 4th Section is that which has in fact been placed thereon by this Court, to-wit, that after the date named where no application was filed, the higher rate to the intermediate point ceased to exist. The assistant general counsel for the Railroad Administration realized that this Court's interpretation of this section was absolutely fatal to his contention. He cannot distiguish the case and he therefore flatly contradicts it and italicizes the contradiction thus: "With all due deference to the late Chief Justice, it *was not* 'enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted'. *It was merely enacted* that such rates *should be unlawful* for the future unless authorized by the Commission upon application" * * * (Page 22 of Assistant General Counsel's Supplemental Brief). He further tries to depreciate the effect of that decision

by saying (page 23): "Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case" * * * This Court, speaking through the late Chief Justice was very particular to answer that very question on Page 323 of 235 U. S., in language beginning thus: * * * "To determine whether Section 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the existence of which it depended" * * * and very specifically points out the nature and effect of the rebilling privileges and wherein the rates there in question were a violation of the long and short haul cause. The Court was very particular also to refer to the fact (Page 325) that in the argument the matter had been put up as a question of preference or discrimination under Sections 2 and 3 of the Act, and not an inquiry under Section 4, but the Court said that notwithstanding this fact and disregarding immaterial considerations of form and looking to the substance of things, that it was a violation under Section 4, and again on Page 326 the Court says: "And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined *by the substance of things, and not by names*, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose." Coun-

sel further attempts to depreciate the effect of this decision by saying (Page 23 of Counsel's Supplemental Brief), that when the case went back to the Commission it was disposed of by the Commission considering it as a case under Section 3 and not under Section 4, and cites Duncan vs. N. C. & St. L. Ry. Co., 35, I. C. C. 477.

We have examined this opinion of the Commission and are at a loss to understand counsel's statement, for the opinion distinctly states that the case was back before the Commission not only as a preference under Section 3, but upon applications of the carriers under Section 4, and the Commission states in its opinion that no facts had been adduced by the carriers under their application under Section 4, which would warrant the Commission in granting relief under that Section. The Commission also refers to the fact that additional applications had been made by the carriers involved in the Nashville Case with reference to the same and additional points and that upon a hearing upon such additional applications the matter would be further considered, but the opinion leaves no doubt that upon the showing upon the applications before the Commission in connection with the remand of the case that the 4th Section had been considered, and the decision was the denial of relief under Section 4 as well as under Section 3. Further reference is made by counsel in the supplemental brief that the Director General does not apprehend that this Court will seek to extend to the determination of the question of what was the legally applicable rate for the

past, the language used by this Court with reference to the Commission's power for the future, "and which was, even in that connection of questionable accuracy." The language of this Court in the Nashville Case applies, we submit, to the interpretation of the 4th Section in all cases irrespective of whether it is specific as to rates for the future or rates in the past which have violated the Act. The language of the interpretation is that after a date fixed by the statute, certain character of rates cease to exist, to-wit, those charging a higher rate for the intermediate haul than for the more distant haul where no application has been made and granted.

The language is neither "of questionable accuracy" nor does it apply more to rates that are to be charged in the future than to those that have been charged. It applies to all charges of the prohibited class.

We submit that the record in this case shows that the rates in question were attempted to be initiated after the expiration of six months after the amendment of the 4th Section of 1910, and that no application had been made to the Commission and no order granting permission to establish or charge any such rate to the intermediate point. Such rate had no force ad initio, and anyone who had been compelled to pay any higher rate than was established to the more distant point had his remedy by collection of the amount charged over that which the law said could be charged. It could make no difference under the interpretation placed on the statute

in the Nashville Case whether the particular controversy referred to rates contemplated for the future or those which had been charged in the past. After the decision in the Nashville Case any shipper between the points in the Nashville Case who had been charged the higher rate than this Court said was lawful could recover the amount by which he had been charged illegally.

The interpretation of the 4th Section as contained in the Nashville Case automatically disposes of counsel's contention that there was no violation of the Act until a shipment had been made and proven to the more distant point, for the higher intermediate rate never went into effect.

The only contention of counsel which is not disposed of by this decision is the contention that the Director General is not subject to the provisions of the 4th Section.

DIRECTOR GENERAL WAS SUBJECT TO THE FOURTH SECTION

It is argued in the supplemental brief that the Director General was not subject to the provisions of the Fourth Section. Section 10 of the Federal Control Act provides "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal law or at common law, except insofar as may be inconsistent with the

provisions of the Act or any other Act appplicable to federal control, or with any order of the President. Actions at law or suits in equity may be brought by it against such carriers and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" * * *

The argument of counsel that the Director General is not subject to the 4th Section is based entirely upon the ground that the Director General was an agency of the Government. The provisions of the 4th Section were not inconsistent with the powers conferred upon the President, and in fact the Director General considered himself subject to that Section. He applied in all cases where he desired to depart from the 4th Section to the Commission for relief from that section, and while 4th Section Order No. 7361 was not and is not in the record in this case, it is quoted on page 84 of the supplemental brief and it appears from the second paragraph of the recitals that the Director General had applied for relief from the long and short haul clause in so far as it was necessary to permit the rates increased by General Order 28 to go into effect. The Interstate Commerce Commission considered the Director General subject to the 4th Section, as shown by its opinion in Johnson vs. A. T. S. F. Ry. Co. (51 I. C. C. 356), noted by counsel in his supplemental brief at page 78, in which the Commission directly held that the application of the

4th Section did not interfere with the unified co-ordinated national control or in anywise hinder the prosecution of the war. This decision was rendered early in the period of Federal control, to-wit, November 11th, 1918. Criticism of this decision is made by counsel, because it is contended that the Director General was not a party to the case, which counsel characterizes as "extraordinary". However in a case decided approximately at the same time, November 15th, 1918, and immediately following it in the report in the same volume at Page 364, in which the Director General was made a party, and in which the Director General appeared by R. Walton Moore, the Director General apparently considered himself subject to the 4th Section, for he did not even request argument on this question or make any objection on the ground, and in the Commission's decision it reaffirmed its opinion on this identical question announced in Johnson vs. A. T. & S. F. Ry. and apparently throughout the period of Federal Control no objection was ever made as far as we have been able to discover, on the ground which counsel now refers to as extraordinary on the part of the Commission. The Director General considered himself subject to the 4th Section, acted thereon by applying for relief and raised no question as to his obligation to secure the order of the Commission in the event he desired to charge more for the shorter than for the longer haul over the same route.

In addition, we submit that the language of this Court in the case of Mo. Pac. vs. Ault, 256 U. S. 559,

decided June 1st, 1921, interpreting Section 10, is very pertinent:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such right or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analagous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the

carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore".

And again, at Page 560:

"The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the government was operating the system, the 'carrier while under federal control' was nevertheless to be liable and suable.

> This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts" * * *

It is true in that case the Court held that the government was not liable for penalties under a state law, but was liable for damages which might reasonably include interest and costs, and this decision is examined and followed in the very recent case of Director General vs. Kastebaum, decided November 12, 1923, 44 Supreme Court Reporter, 52, wherein the Director General was held liable for damages for false imprisonment, and in that decision the Court, speaking through the chief justice, said:

> "The government under Section 10, in the case of false imprisonment stands exactly as if it were a railroad corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown as without probable cause, and made by one of its detectives employed to protect the property entrusted to its care as a common carrier."

It is suggested on Page 77 of the supplemental brief as one of reasons why the 4th Section did not apply to the Director General was that competitive conditions were eliminated by federal control which were at the bottom of the evil aimed at during private control. That fact is more of an argument for the Director General

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being subject to the 4th Section than not, for the only reason for permitting a greater rate for the shorter haul was competitive conditions, and the elemination of competitive conditions eliminated any reason for the Director General establishing any higher rate for the shorter haul, and hence is more of an argument in favor of the inhibition of the 4th Section against the Director General than of the fact that he could arbitrarily make a higher charge for the shorter haul than for the longer. It was certainly not the purpose of Congress to arbitrarily put in the hands of the Director General an instrument which with transportation competition eliminated could only be a means of killing business, and no such arbitrary power was certainly intended, for under the existence of federal control the only purpose of establishing such a rate would be to kill the business to the shorter point to the advantage of the longer point. The intent of the Federal Control Act was diametrically the opposite, for any rate established by the Commission was subject to the jurisdiction of the Interstate Commerce Commission—the only limitation upon it was that pending the investigation and decision the rate should not be suspended—it did not legalize the rate which might thereafter be found on investigation to be illegal, and it did not take out of the jurisdiction of the Court and place in the Commission jurisdiction of any question which had previously by existing law been lodged in a court.

The discussion of the supplemental brief is apparently made as a general discussion of the law without any particular reference to the record in this case. The discussion continually refers to the 4th Section order of the Interstate Commerce Commission, No. 7316, and the same is set out as an appendix to the brief. Neither this order nor the application thereof was offered in evidence and is not before this Court.

We respectfully submit that the judgment of the lower courts should be affirmed.

JAMES G. WILSON,
Attorney for Defendant in Error.

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No. 123.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, PLAINTIFF IN ERROR,

v.

A. J. PARRINGTON, DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE.

WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, plaintiff in error,
v.
A. J. PARRINGTON, DEFENDANT IN ERROR.

No. 123.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE.

WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

REASONS FOR AND SCOPE OF SUPPLEMENTAL BRIEF.

This supplemental brief upon behalf of the plaintiff in error in Docket 123, James C. Davis, Agent of the President and Director General of Railroads, is necessary for the following reasons:

(1) To place before the Court a somewhat different construction of the fourth section with reference to

damages than that set forth in the joint brief heretofore filed in this docket and in Docket 122 on behalf of said Davis and of the San Francisco and Portland Steamship Company.

(2) To place before the Court certain additional reasons why the Director General should not be held subject to the fourth section.

(3) To point out to the Court certain deficiencies in the record before the Court which may prevent the Court from considering certain facts of the utmost importance, and of which the Court should be advised in order that the Court may properly delimit its decision on this record so as to avoid any possibility of prejudicing a consideration of such facts if properly presented on other records.

Both dockets involve alleged violations of the long-and-short-haul clause of Section 4 before, during, and after Federal control, in connection with shipments of sugar wholly by water from San Francisco, California, to Portland and Astoria, Oregon, to which points higher rates were published than to a more distant point, North Portland.

At the outset and before undertaking to discuss the proper construction of the fourth section or its application to the Director General, it is desired to point out to the Court the deficiencies of this record.

This record fails to show affirmatively what was the fact, that from and after June 25, 1918, the Interstate Commerce Commission had by its fourth section order 7316 granted relief to the Director General from the provisions of the fourth section,

under the powers conferred upon the Commission by the first proviso of that section—

> from time to time (to) prescribe the extent to which such designated common carrier may be relieved from the operation of this section—

and that reference to the Commission's order appeared on the face of the tariffs themselves.

There is appended to this brief a copy of this fourth section order of the Commission.

It should be noted, moreover, that while this fourth section order was not made part of the record in the District Court, some intimation of it apparently was given to the Circuit Court of Appeals, as appears from the decision of that court. (Tr. 146,147.[1]) It would seem, however, that the order was either not clearly put before the court, or the court did not clearly understand it. In any event, the court held that, since it had not been considered by the lower court, it was not before the Court of Appeals for decision. The Director General is not advised whether, under the peculiar circumstances of this case, this Court will take judicial notice of this order. The existence or non-existence of such an order, however, may well be, as will subsequently appear, of controlling effect in determining whether damages should be awarded in connection with the fourth section, and as this case is but one of a considerable number of cases involving this question which are now or will shortly be before this Court,

[1] Transcript references, unless otherwise stated, are to Docket 123.

it is essential to refer to the order, if for no other purpose than to distinguish those cases where it properly appears of record.

Likewise it might seem that, since it is the Director General's contention that he was not subject to the fourth section, it would be superfluous for him to discuss the question of damages under that section. The Director General, however, believes that nothing will more clearly serve to demonstrate that the fourth section could not have been applicable to him than a correct understanding of the meaning of that section, and of what Congress intended to accomplish by it. Therefore, before discussing the applicability of the fourth section to him, the Director General will seek to make clear what he believes to be the proper construction of that section, since by so doing it must become obvious that the provisions of that section are necessarily in direct conflict with the power to initiate rates conferred upon the President by the Federal Control Act, and by the President delegated to him.

Moreover, as this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth section as a whole, and of its

interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole, a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as apparent from the various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other, but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause, and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, first be discussed, and then the question as to whether the Director General was subject to that section.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the defendant in error (hereinafter referred to as the plaintiff), and the theory of both the District Court and

of the Circuit Court of Appeals is that the rate legally applicable between San Francisco and Portland, and the rate which the carrier, therefore, should have collected, was not the higher rate actually published in the tariffs between San Francisco and Portland,[2] but was the lower rate published in the tariffs from San Francisco to the more distant point, North Portland. In other words, it is the plaintiff's contention, and the theory of both courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section to the tariffs, the higher rate actually published from San Francisco to Portland becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from San Francisco to North Portland, though not actually published in the tariffs to apply to Portland, must, in effect, be treated as actually published to that point and to be the only legally published rate to Portland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published between San Francisco and Portland was a straight overcharge above what is contended to be the only legally published rate, the lower rate from San Francisco to North Portland,

[2] For convenience reference will be made here only to Portland and not to Astoria, and for the purposes of this argument it will be assumed, as contended by the plaintiff, that North Portland is more distant than Portland, though the court should note that the plaintiffs in error did not concede this in the Circuit Court of Appeals (Tr. 140), nor is it conceded in their brief heretofore filed.

though this latter rate was never actually published to Portland.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct conflict with what would seem to be the conclusions necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected and retained.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument what he contends to be the correct construction of the fourth section with reference to damages, before

attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of the Commission. For convenience the fourth section has been appended in full to this brief.[3]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as foliows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance,or violates the aggregate-of-intermediates clause, because greater than an existing combination, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter

[3] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates

clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause, the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate to the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the

point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, and while the record fails to show, what was the fact, that the Commission had relieved the Director General from the operation of the fourth section and that the tariffs themselves actually bore a reference to the

Commission's order, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the Director General to rebut what might otherwise be contended, that the rate to Portland for the

[4] For the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the brief heretofore filed on behalf of the petitioner attacks the jurisdiction of the court in this respect.

shorter distance was prima facie unreasonable because of the lower rate for the longer distance to North Portland.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate to Portland, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the District Court and of the Circuit Court of Appeals, that the higher rate actually published from San Francisco to Portland, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from San Francisco to North Portland, though not actually published in the tariffs to apply to Portland, must, in effect, be treated as actually published to that point, and to be the only legally published rate to

Portland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrate the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by the mere *publication* of a rate, but forbids, and is violated only by the *actual charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from San Francisco to Portland to be read out of the tariffs, there is no provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section, which will warrant *reading into the tariffs* the lower rate published solely from San Francisco to North Portland, so as to treat it as if actually published from San Francisco to Portland. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged

too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor

either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the

higher rate actually published between San Francisco and Portland out of the tariffs, and to permit the carriers to charge between San Francisco and Portland the lower rate actually published only from San Francisco to North Portland, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for such transportation of * * * property * * * between the points named in such tariffs *than the rates,* fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified,*

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges upon which the same are transported by said

carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from San Francisco to Portland, and to charge only the lower rate actually published from San Francisco to North Portland, is afforded if the Director General be correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate between San Francisco and Portland could be ignored, since

so far as this record goes there is nothing to show that there had been any actual movement from San Francisco to North Portland and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation

resting upon the carrier to collect the published rate, even though it violates the fourth section.

The case of *United States* v. *Louisville & Nashville R. R., supra,* is cited on page 37 of the brief of the defendant in error, and the following language is quoted from pages 322 and 323 of that decision:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on application made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases,* 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.)

The defendant in error completely and blandly ignores the context in which this language was used. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above, but which the defendant in error did not italicize in its brief, clearly implies the Court's recognition of the fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, neverthe-

less, to continue in force until changed as provided by law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand the *Piper case*, which is not even cited by the plaintiff (defendant in error) in its brief, might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from San Francisco to North Portland violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the

shipper, although the form of the bill of lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried

to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published between San Francisco and Portland and read into the tariff the rate actually published only between San Francisco and North Portland without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*,

consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful

> rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

Mississippi Valley Iron Co. v. *Director General*, 74 I. C. C. 715.

Wilson & Co. v. *Director General*, 74 I. C. C. 555.

In certain of these decisions it is true that the Commission granted reparation because it found the rates otherwise unlawful. In certain of them, moreover, as will subsequently be pointed out, the Interstate Commerce Commission was itself in error in holding the long-and-short-haul clause violated, since in none of them was there any proof that the lower rate for the longer distance was actually charged and received. Likewise, in certain of them the Commission's own records should have shown that the departures from the long-and-short-haul clause of fourth section were protected by the Commission's fourth section order 7316.

The significance of these cases, however, in connection with this portion of the argument is that

whether the Commission was right or wrong in holding that the fourth section was violated, the Commission still held that the higher rate at the intermediate point was the legally applicable rate, even where the Commission awarded reparation because the legally applicable rate was otherwise unlawful.

The grounds upon which the Commission recognizes that section 6 must be construed as mandatory in requiring the collection of the legally published rate, whether or not that rate be unlawful under other sections of the Act, are well set out in the Commission's decision in *Crescent Coal & Mining Co.* v. *C. & E. I. R. R. Co.*, 24 I. C. C. 149, pp. 156, 158. The Commission there says:

> The sole question to be determined in the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate *under other sections of the act* with its *legality* under section 6. For example, a rate unreasonably high and unlawful in the sense of section 1 may, nevertheless, be the legally established standard and rule of action under section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute. This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether knowingly in the usual course or inadvertently or for collusive or other improper purposes.
>
> * * * * *

In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * *

This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter

> *of the law, but with the only construction which will preserve the chief function of section 6*, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the decision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-

and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 12.) It will suffice to say here that the right of a court to award damages for violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such

administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of

> property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of

property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. More extended reference will subsequently be made to the Congressional Debates in connection with the amendment of the fourth section in 1910, in order to show so far as possible what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point and by taking constructive possession of a shipment and rebilling it to its ultimate desti-

nation, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped, at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-

and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion

of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of that section[6] and that where such relief is granted

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause will be considered subsequently.

a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation

of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The controlling importance, however, of this distinction is well illustrated by this very case. While here, as already explained, the record fails to show what was the fact, that is, that the Commission had actually issued an order relieving the Director General on and after June 25, 1918, from the operation of the fourth section, and that the tariffs on their face bore reference to this order, the record still fails to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published to North Portland, was ever actually charged and re-

ceived. In other words, the defect of this record in failing to show relief from the fourth section becomes unimportant, since, as there was no actual departure from the long-and-short-haul clause, there was no necessity for relief.

Nevertheless, a consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose on the one hand that the practically penal provisions of the fourth section should not be held applicable to the Director General, while on the other hand that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates, even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Ana-*

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R. Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points in La. & Tex.*, 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

conda Copper cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage which it would have applied in the absence of any supposed violation, and had the question merely been as to whether damage had otherwise been proved under the first, second, or third sections of the act. This is clearly shown by the two majority reports of Commissioner Hall in the *Iten Biscuit* case and by the dissenting report of Commissioner Harlan in the *Oregon Fruit* case, which was directed to the report in the *Iten Biscuit* case as well. It is to be noted in this connection that Commissioner Harlan erroneously assumed, as did the majority, that an actual violation of the long-and-short-haul clause was involved, and on that assumption his criticism of the decision of the majority as failing to give any force whatever to the express provisions of the long-and-short-haul clause of the fourth section itself is undeniably sound. Commissioner Harlan says in the *Oregon Fruit* case, 50 I. C. C. 719, at page 723:

> The majority report nevertheless does not even place upon the carriers at fault the burden of showing that the higher rates at the intermediate points were reasonable and nondiscriminatory, but leaves upon the complainant the burden of supporting its claim for reparation by showing the rates to have been unreasonable or unjustly discriminatory, *precisely as if there were no fourth section at all in the act to regulate commerce.*

That Commissioner Harlan was not in error as to the theory of the majority—that is, that a violation of the fourth section does not involve any different criteria of damage than a violation of the first, second, or third sections—is fully confirmed by the specific holding of Commissioner Hall to this effect, noting on page 733 that the higher rate for the shorter distance was not itself unreasonable. Commissioner Hall had said on page 732, with reference to the decision of this court in the *International Coal* case, 230 U. S. 184:

> While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

And again on page 733:

> Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3 there must be proof of damage and under

> section 4 the departure therefrom is of itself proof of damage.

It should be noted that in the latter quotation from Commissioner Hall's report he assumes that the only alternative to holding that for violations of section 4 there must be the same proof of damage as required by the *International Coal* case for violations of sections 2 and 3, is to hold that under section 4 the departure therefrom is of itself proof of damage. In this Commissioner Hall was doubtless misled by the contention of the complainants in that case, noted at page 731 of his report, where he says:

> With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate

charged for the longer distance, and that this presumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under

all circumstances be collected. On the one hand, therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section 4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial,

is to give no effect whatever to the express declaration of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what

constitutes violation under the aggregate-of-intermediates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does not consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-

short-haul clause does not make the charging of the lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the

violation can not be avoided except by charging the same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of

damage must be the difference between the higher published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under

sections 1, 2, or 3 had the aggregate-of-intermediates clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation

of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the pre-

sumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable

80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar circumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual

violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what

profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a

penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act. Were it a penalty it clearly would not have been applicable against the Director General. *Mo. Pac. R. R. Co.* v. *Ault*, 256 U. S. 554. Nevertheless, while it is not a penalty, the Director General submits that the public wrong aimed at was one of which it could not be presumed the government itself would be guilty in the operation of the railroads, but rather a wrong incident to the stress of competition under private control. Therefore the Director General contends that the harshness of the rule of damages under the fourth section flowing from the nature of the public wrong at which that section was aimed during private control, serves to make clear that that section itself should not be held applicable to him.

Before discussing this ultimate contention, however, it is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that, even if the almost penal provisions of the fourth section be held—as they should be—inapplicable to the Director General, the shippers still have protection against the charging of a higher rate for a shorter distance, or of a higher through rate

than the aggregate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 5 to 13 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 10 to 13. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual violation of the long-and-short-haul clause, because

of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because greater than an existing combination, but

that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for

the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since he neither proved nor attempted to prove that any shipments ever moved to North Portland upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not purport to cover any incidental damages for violations of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

It remains to consider whether the fourth section itself can be held applicable to the Director General.

IV.

The Director General should not be held to have been subject to the fourth section.

It has already been suggested that the proper construction of the fourth section with reference to damages for actual violations thereof tends strongly to show that that section could not have been intended to apply to the Director General because of the harshness of the rule of damage necessitated by conditions of private control. Furthermore, it has been noted that questions have at least been raised as to whether or not the Commission has power under the first proviso of the fourth section as amended in 1910 to relieve a carrier from the operation of the aggregate-of-intermediates clause, or whether that power is confined to relief from the long-and-short-haul clause.[8]

[8] Chairman Mann of the Interstate Commerce Committee of the House expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation to authorize a company to charge less for the long haul than they do for the short haul." Pages 4579, 4580 Congressional Record, April 12, 1910.

It will be noted that the first sentence above quoted applies to both clauses of the fourth section, while the second sentence refers specifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

If this power does not extend to the aggregate-of-intermediates clause, further argument is furnished why the fourth section should not be held applicable to the Director General. It would impose upon the government under the aggregate-of-intermediates clause, practically absolute liability for damages from which the Commission would be powerless to relieve it, such stringent liability having been imposed upon private carriers because of abuses incident to competition under private operation without any analogy under Government control.

Again, it has been argued by the plaintiff and by shippers generally that, even if the Commission has power to relieve from both clauses of the fourth section, it can not grant such relief by any such blanket order as it actually made in the case of the Director General. (See its fourth section order 7316 in the Appendix.) Assuming this to be so, it would but make still more clear the impropriety and injustice of attempting to apply the fourth section to the Director General. It would mean that the Director General or, in other words, this government, faced with a tremendous war emergency, demanding an immediate increase in revenue in order, as the President's proclamation recites, to provide for the carrying on of essential transportation for war purposes, could obtain no practical relief from the Commission from violations of the fourth section surviving over from private control, and involving, if no relief should be obtainable, substantial reductions in revenue, since the emergency

made it impossible to investigate each rate and each tariff, and therefore to enter a separate order as to each.

All these considerations, however, are but inducements leading up to the fundamental and insurmountable objection to any attempt to apply the fourth section to the Director General; that is, that the application of that section to the Director General would be in direct and inevitable conflict with the power conferred upon the President by section 10 of the Federal Control Act—

> that during Federal control, whenever in his opinion the public interest requires, *the President may initiate rates*, fares, charges, classifications, regulations, and practices, *by filing the same with the Interstate Commerce Commission*, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

There is nothing ambiguous about the power conferred upon the President under section 10. It is unrestricted power to initiate rates *by filing* them with the Interstate Commerce Commission. There is no limitation upon the character of the rates to be initiated, and there is specific provision against the Commission suspending their effectiveness after they are so initiated. Yet if the fourth section be applicable to the Director General, the President, through the Director General, could not by filing a rate with the Interstate Commerce Commission have initiated a rate, the collection of which would violate

the provisions of the fourth section, so as to render such a rate a lawful rate free of any ultimate liability, without first obtaining the permission of the Interstate Commerce Commission for such filing, and therefore for such initiation.

That the fourth section as amended in 1910 was specifically intended to and did deprive the carriers of the power to initiate such rates can no longer be a matter of speculation or construction. In the *Intermountain Rate Cases*, 234 U. S. 476, this court, speaking through the late Chief Justice, at pages 482 to 486, said:

> Almost immediately after the adoption of the Act to Regulate Commerce in 1887 (February 4, 1887, c. 104, 24 Stat. 379) the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long-and-short-haul clause *and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions* and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. *We say primarily, because, of course, it was further recognized that the authority existing in car-*

riers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were, therefore, operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction being authorized could not be a preference or discrimination, and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin. (Pages 482, 483.)

* * * * *

It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since

the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. *It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review.* And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long-and-short-haul clause it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. *Texas & Pac. Railway* v. *Interstate Com. Comm.*, 162 U. S. 197, 218.

With the light afforded by the statements just made, we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short-haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commis-

sion authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short-haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function.* In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist,* because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. *But while the public power, so to speak, previously lodged in the carrier is thus*

> *withdrawn and reposed in the Commission,* the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections. (Pages 483, 484, 485, 486.)

Had Chief Justice White been passing specifically upon the question of the propriety of the application of the amended fourth section to the Director General, he could not have stated more conclusively the insurmountable objections to any such application. It will be noted, from those portions of his opinion which have been here italicized, that the provisions of the fourth section prior to its amendment in 1910 would have been entirely consistent with the unrestricted power conferred upon the President to initiate rates of any character. It will be observed that Chief Justice White construed the fourth section prior to its amendment as leaving to the carriers the primary right to initiate such rates—

> subject to the subsequent supervision and control of the Interstate Commerce Commission and to ultimate judicial review.

On the other hand, it will be observed that because of the abuses, or supposed abuses, by the carriers in the exercise of this primary judgment Congress—

> shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of the public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist. * * * But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted.

This being so, the Director General in the operation of the carriers during Federal control must be held to have been exempted from the amended fourth section of the Interstate Commerce Act by the express provision of section 10 of the Federal Control Act that—

> carriers while under Federal control shall be subject to all laws and liabilities as common

> carriers, whether arising under state or federal laws or at common law, *except in so far as may be inconsistent with the provisions of this act* or any other act applicable to such Federal control or with any order of the President.

It would be superfluous, therefore, to indulge in any further argument to demonstrate that section 4 as amended is in direct and necessary conflict with the power conferred by section 10 itself upon the President to initiate rates. It, however, may do no harm to suggest why, in any event, it could not reasonably be assumed that that section as amended was intended to apply to the Director General. The amendment was, as already stated, directed to the abuses by private carriers, perhaps less serious than represented to Congress, in the initiation of such situations under the stress of competitive conditions under private operation. It certainly can not be presumed that Congress would impute to the President or the Director General either ulterior motives in initiating such rates or be unwilling to trust the judgment of the President or of the Director General in the first instance. Furthermore, competitive conditions were eliminated by Federal control, which were at the bottom of the evil aimed at during private control. Moreover, without the amendment of 1910 and as section 4 had previously stood, supported as it was by sections 1, 2, and 3, the President's initial power would have been, like the carriers', in any event, subject to the ultimate review and control of the Commission. The Director General then

believes it impossible to reach any other conclusion than that section 4 as amended in 1910 was inapplicable to him.

Curiously enough, however, the Interstate Commerce Commission has itself concluded to the contrary, in the case of *Johnson* v. *A. T. & S. F. Ry. Co.*, 51 I. C. C. 356. More extraordinary still, the Commission undertook to determine a question of this great importance to the Director General in a case to which he was not even a party and in which he had no representation by counsel or otherwise, and over the protest of the then chairman of the Commission, Mr. Daniels. The Commission said, p. 361 of its opinion:

> Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the federal control act of March 21, 1918, and the full exercise of power conferred thereby. That act expressly provides that rates initiated by the President "shall be reasonable and just." Under section 4 of the act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned, and the burden is placed upon the carriers of showing that the situations apparently within the scope of the prohibition are in reality "special cases," justifying the exercise by us of a sound, legal discretion in authorizing departures from the general

rules laid down. *It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control or in any wise hinder the prosecution of the war.* As the situations covered by the fourth section can be reached by orders under the first three sections of the act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroads and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us fourth section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

The act to regulate commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the federal control act or other acts applicable to federal control or with any order of the President. There has been no order of the President in the exercise of his war powers declaring that the enforcement of section 4 interferes with the efficient operation of railroads and systems of transportation under federal con-

> trol. Clearly no such declaration is contained in the act itself, and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of section 4 it must be presumed that language appropriate to that end would have been used, as was done with the power of suspension under section 15.

It can only be said with reference to the Commission's foregoing expression of opinion on this question that, had the Commission chanced the possible benefit of an expression of the Director General's views in the premises, the Commission, at least, would not have been permitted to labor under the singular misapprehension indicated in the portion of its opinion first italicized, where the Commission states:

> It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control, or in any wise hinder the prosecution of the war.

Even, however, without the benefit of the Director General's views on the fourth section, it is impossible to conceive how the Commission could have supposed for a moment that anyone would seriously contend that the enforcement of the fourth section could "interfere with unified, coordinated national control." On the other hand, the enforcement could conceivably "hinder the prosecution of the war," by depriving the Director General of essential revenues. The Commission, however, not only does not attempt

to deny, but even fails to mention, that at least a conceivable, or, as has been shown here, an inevitable, result of the enforcement of section 4 against the Director General would be to deprive the President of the unrestricted power conferred upon him by section 10 of the Federal Control Act to initiate rates by merely filing them.

In fact, the only portion of the Commission's opinion which does not afford its own answer is the last sentence quoted above. Superficially it might seem that since Congress in the Federal Control Act specifically provided that—

> said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination—

and thereby expressly exempted the Director General from the power the Commission had under section 15 of the Interstate Commerce Act to suspend rates published by a carrier, Congress would, had it intended to set aside the provision of section 4 of the Interstate Commerce Act as against the Director General, have provided like specific exemption. That no such deduction is justified, however, readily appears when it is understood that the power of the Commission to suspend rates already initiated would still have been consistent with the unrestricted power in the Director General to initiate rates by merely filing them. Therefore it was necessary for Congress, if the Commission were not to exercise its power to suspend under section 15 of the Interstate Commerce Act as against the President, to exempt the President

expressly from the Commission's power in this respect. On the other hand, it was unnecessary, and would have been superfluous, to exempt the President expressly from the requirement of section 4 that application must be made to the Commission for relief from the provisions of the fourth section before lawful rates could be filed involving departures from the provisions of that section, since this was inevitably in conflict with the unrestricted power conferred upon the President under section 10 of the Federal Control Act to initiate rates by merely filing them with the Commission.

The Director General, therefore, submits that, for the reasons specified in this brief, as well as for the additional reasons furnished by the brief heretofore filed in his behalf, this court should reverse the judgment of the Circuit Court of Appeals.

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WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

* * * * *

FOURTH SECTION ORDER NO. 7316—GENERAL NO. 17.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of May, A. D. 1918.

Whereas, The President of the United States, through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General:

And Whereas, The said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provision of section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules

containing rates, fares, charges, or classifications containing departures from aforesaid provisions of section 4, enabling carriers under federal control in the present emergency to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918:

It is ordered, That in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges, and classifications which exceed the aggregate of the intermediate rates, fares, charges, and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges, and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce.

And it is further ordered, That carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges, and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director

General without observing the provisions of the fourth section of the act to regulate commerce.

It is further ordered, That this order shall supersede and take the place of any provision or provisions of any fourth section order or orders heretofore issued that may be in conflict herewith.

The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges, and classifications being subject to complaint, investigation, and correction if in conflict with any provision of the act.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

○

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Nos. 122 and 123

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY (a corporation), *Plaintiff in Error,*
vs.
A. J. PARRINGTON, *Defendant in Error.*

No. 573

JAMES C. DAVIS, Agent, United States Railroad Administration, *Plaintiff in Error,*
vs.
A. J. PARRINGTON, *Defendant in Error.*

UPON WRITS OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF DEFENDANTS IN ERROR.

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UPON WRITS OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF DEFENDANTS IN ERROR.

This brief is filed pursuant to permission granted by the Court. We shall discuss only two points made in the brief of plaintiffs in error, viz., the points made at pages 59 and 68 respectively. These points are as follows:

> *If section 4 applies to shipments wholly by water, was it violated?*
>
> *The measure of damages is not the difference between the rates. No other evidence of damage was offered so there can be no recovery.*

REPLY TO ARGUMENT THAT SECTION 4 WAS NOT VIOLATED.

The contention here is that section 4 was not violated because no shipments of sugar were in fact made to North Portland, the more distant point.

After quoting the language of the Fourth Section counsel say "a carrier cannot 'receive' more for the short haul than the long, without actually collecting charges for both."

Obviously the section means that carriers shall not charge or receive more for the less distance than they charge or receive for the greater distance.

In *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 960 (C. C. A.) the Circuit Court of Appeals for the Ninth Circuit, in construing the long and short haul clause of the Constitution of California, said:

> "The effect of the constitutional provision is to fix a measure of charge and that measure is the charge which is actually made for the

longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor."

The provision of the California Constitution is identical with the provision of the Fourth Section. In the case of *California Adjustment Company v. A. T. & S. F. Ry. Co.*, 179 Cal. 140, 153, this same contention was made and overruled. The decision was by the Supreme Court in bank and all of the Justices concurred. The Court said:

"Nor do we think it material whether, when the shipments to intermediate points complained of as excessively charged for were made, no contemporaneous shipment to the more distant point was made. Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one. Actual shipment for the longer distance is not required to be shown. All that is required is a showing that the defendant held out and published to the shipping world that it would charge certain rates for the transportation of a certain class of merchandise from San Francisco to Los Angeles. This was shown, and, when shown, for the purpose of determining whether discrimination was practiced or not, the rates so held out to be charged are deemed in law to have been charged."

If the construction contended for by defendant in error were correct, chaos would result. The uniformity and certainty of rates which is one of the cardinal objects of the Interstate Commerce Act would be destroyed. Before a shipper to Portland, for example, could ascertain what he should pay for a shipment of sugar, he would have to make an investigation to see whether the carrier ever actually transported a similar shipment to North Portland. And it may be asked: Would it be sufficient to show that such a shipment moved two years before or one year before or would the shipper be required to show that it moved at the same time? Or would it be sufficient to show that such a shipment moved subsequently to the plaintiff's shipment?

And if proof of a subsequent shipment was sufficient, would a shipper be obliged to wait until such subsequent shipment was made before his cause of action accrued? In such event the charges, lawful when paid, would be rendered unlawful by a subsequent act of the carrier.

Assume that one merchant in Portland shipped his sugar from Oakland and that another shipped it from San Francisco. Assume further that the merchant who shipped from Oakland could show an actual shipment of sugar from Oakland to North Portland, whereas the merchant who shipped from San Francisco was unable to show such a shipment to North Portland. The result would be that the

merchant shipping from Oakland would receive the benefit of the lower North Portland rate, whereas the San Francisco shipper would not. If such were the law all that a shipper would have to do in order to obtain the benefit of the lower rate to the more distant point would be to ship a hundred pounds of the same commodity to that point or procure some friend to make such a shipment. By such a subterfuge he would obtain the benefit of the lower rate on all his shipments of sugar while his competitor who shipped his sugar from another point, but who did not resort to the subterfuge, would be compelled to pay the higher rate.

We do not think that defendant in error would have made this contention if its counsel had given the matter any serious thought or attempted to follow the argument to its logical conclusion.

As stated above, one of the cardinal objects of our railroad legislation is to insure the certainty of rates. Under our law there can be no uncertainty or obscurity in such a matter. A tariff specifying a lower rate to a more distant point is to be read as specifying that rate to all intermediate points where the rate to the intermediate points specified in the tariff exceeds the rate specified to the more distant point. In precisely the same way a tariff specifying two intermediate rates which total less than the long haul rate will be construed to make the sum of the intermediate rates the rate to the long haul point. It is simply a matter of tariff construction.

In *Louisville & N. Ry. Co. v. Walker*, 110 Ky. 961 (63 S. W. 20), *supra*, the Supreme Court of Kentucky said:

> "Cave City and Glasgow Junction are stations on appellant's road between Bowling Green and Louisville, and at the time of these shipments appellant charged 20 cents a hundred pounds for transporting tobacco from Bowling Green to Louisville. Glasgow is 10 miles from Glasgow Junction, and is on a branch road running out from the main line at Glasgow Junction. Appellant charged 6 cents a hundred pounds for transporting tobacco from Glasgow to Glasgow Junction, and 30 cents for transporting it from Glasgow Junction to Louisville. Appellee filed this action in February 24, 1899, *to recover for the excess charged him for the short haul over and above the amount charged for the longer haul* from Bowling Green, and recovered judgment for $205.32. It is insisted for appellant that the action does not lie, and that there can be no recovery, because it does not appear that appellee has been damaged. In *Hutchinson v. Railroad Co.*, 57 S. W. 25, we held that the action could be maintained, and, upon a reconsideration of the question, adhere to the ruling in that case. *If a carrier charges a shipper more than the law allows him to charge, the excess so paid may be recovered by the shipper.* If there had been a statute fixing the charge from Cave City to Louisville at 20 cents, and appellant had charged 29 cents, the excess so paid above the legal rate might be recovered, on the ground that it had been illegally exacted. Section 218 of the constitution is in these words: 'It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate, for the

transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operation of this section.' When the constitution was formed there was great complaint that local shippers, who had no other means of getting their goods to market, were sometimes made to pay more than their just share of the cost of transportation, and that while at competitive points, where competition rendered it necessary, the rates were reasonable, at intermediate points along the line, where there was no competition, extortion was practiced. The section quoted was designed to protect these people who were, so to speak, in the power of the carrier, having no other way to get to market. It was not designed for the protection of the long haul. Experience had shown that, by reason of competition and other circumstances, the shippers over the long haul were not so much in need of protection. *As one means of protecting the local shipper, this section fixed a maximum*

limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. *When the charge for the longer haul is fixed, to charge more for the shorter haul is just as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge. The carrier is allowed by the constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit, beyond which he cannot go in charging for the same service in the shorter haul.* And when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge."

In *Junod v. Chicago & N. W. Ry. Co.*, 47 Fed. 290, *supra*, Judge Shiras instructed the jury as follows:

"In the second count of the petition it is substantially charged that between the 17th of February, 1888, and the 1st of March, 1888, inclusive, the defendant company had in force a tariff rate for which it carried corn and oats from Blair and other points in Nebraska, over its line in Iowa, passing through Carroll, Iowa, to Chicago, Ill., and thence to New York, at the rate of 36½ cents per 100 pounds; that the plaintiffs, between the dates aforesaid, had at Carroll, in the state of Iowa, for shipment east,

64,250 pounds of grain; that the defendant company demanded for shipping grain to New York from Carroll, Iowa, the sum of 46½ cents, or 10 cents more per 100 pounds than it was then charging for the like service to shippers from Blair and other points in Nebraska; that by reason of these facts the plaintiffs were compelled to ship the grain aforesaid to Chicago, Ill., paying therefor at the rate of 19 cents per 100 pounds; and by reason of these facts the plaintiffs are seeking to recover the damages alleged against the defendant company. * * * If a party, under the law, is entitled to have the same rate,—that is, if the shipper at Carroll, Iowa, was entitled to have the same rate charged him for the forwarding of his property from Carroll, Iowa, to Chicago, Ill., as the shipper at Nebraska, and he was charged more,—the damage to him is the difference between the rates that he was thus called upon to pay and the lesser rate charged the Nebraska shipper. If the tariff rate from Blair and other points in Nebraska was 11 cents, and the plaintiffs had to pay 19 cents; if, under the law, as I have instructed you, the duty and obligation was on the railway company to give the benefit to the shippers at Carroll, Iowa, of the same rate,—of an equal rate with that given to the shippers from Blair and other points in Nebraska,—you see the damage to the parties who have been compelled to pay this higher rate is the difference between that and the lesser rate. If, for every 100 pounds they were compelled to pay 8 cents more, that is the damage per 100 pounds of grain shipped that is caused them."

The Court did not hold that it was incumbent upon the plaintiff to show that any shipments had moved from the Nebraska points, it being sufficient

that the defendant's tariff specified lower rates from such points.

We might quote from other decisions to the same effect, but we deem it unnecessary. In no decision of any court, so far as we have been able to discover, involving a violation of a long and short haul prohibition, was it even intimated that it was necessary for the plaintiff to show an actual movement of the same kind of freight for the longer distance at a lower charge. It has always been held sufficient for the plaintiff to show that the railroad maintained the lower rate for the longer distance.

This is the simple case of an *overcharge;* the statute fixes the charge to the more distant point as the maximum charge to the less distant point. And if a carrier charges more than such maximum charge the shipper is overcharged to the extent of the excess.

Counsel cite *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, in support of their contention.

Instead of supporting the position of plaintiffs in error that case is authority to the effect that the assignors of defendants in error are entitled to recover the difference between the higher charges paid by them for the shorter distance and the lower rate charged by the carrier for the longer haul.

The *Parsons* case was an action to recover damages for a violation of the long and short haul clause of the 4th Section of the Interstate Com-

merce Act before the amendment to that section on June 18, 1910. The trial Court sustained a demurrer to the complaint on the ground that the complaint did not show a violation of the long and short haul clause of the act, and this judgment was affirmed by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals was affirmed by this Court upon the ground that the complaint stated no violation of the long and short haul clause of the act. *This Court said, however, that if there had been a violation of the long and short haul clause the plaintiff would have been entitled to recover the difference between the rate which he had paid and the lesser rate for the greater distance.* This Court said:

> "If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped."

The plaintiff in the *Parsons* case shipped corn from Iowa points to Chicago. The complaint did not show that the rates from Nebraska points to Chicago were lower than the rates paid by plaintiff; nor did it show that the rate charged plaintiff from Iowa points to Chicago was greater than the through rate charged from Nebraska points to New York and other places on the Atlantic seaboard. This Court said:

> "There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa

> place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places."

The decision of this Court in the *Parsons* case shows that the Court deemed the measure of damages under the Interstate Commerce Act, in case of a violation of the long and short haul clause, to be the excess over the charge that would have been collected had there been no violation of the act.

In every case where the question has come before the higher Courts it has been held that for a violation of the long and short haul clause the shipper to the less distant point is entitled to recover the difference between the rate paid by him and the lower rate charged to the more distant point.

It was so held in each of the following cases where the matter was directly involved:

Parsons v. C. & N. W. Ry. Co., 167 U. S. 447, *supra*;

Southern Pacific Co. v. California Adj. Co., 237 Fed. 954 (C. C. A.);

California Adjustment Co. v. A. T. & S. F. Ry. Co., 179 Cal. 140;

Louisville & N. Ry. Co. v. Walker, 63 S. W. 20 (110 Ky. 961);

Hutchinson v. R. R. Co., 57 S. W. 25 (Ky.);

Twells v. Penn. R. R. Co., 2 Walker 450 (3 Am. Law Reg. N. S. 728) (Penn. Supreme Court).

It was so held in each of the following cases decided by the lower Courts:

Junod v. C. & N. W. Ry. Co., 47 Fed. 290;
Osborne v. C. & N. W. Ry. Co., 48 Fed. 49;
California Adjustment Co. v. S. P. Co., 226 Fed. 349.

The long and short haul provision of the Constitution of California as adopted in 1879 was taken from the Constitution of Pennsylvania of 1873 (Sec. 3, Article XVII) and that provision of the Pennsylvania Constitution was taken from an Act of the Legislature of Pennsylvania (March 7, 1861, P. L. 88) which provided that the local rates from Pittsburg and Philadelphia to intermediate points should at no time exceed the rate from Pittsburg to Philadelphia or from Philadelphia to Pittsburg. (*Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652.)

In *Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652, *supra*, decided under the provisions of the Constitution of Pennsylvania, the Court held that a person who was charged more for the shorter haul could maintain concurrently an action at law to recover the *overcharge* and a suit in equity to enjoin the carrier from thereafter making a greater charge for the shorter haul.

REPLY TO CONTENTION THAT THE MEASURE OF DAMAGES IS NOT THE DIFFERENCE BETWEEN THE RATES.

This point also has been determined adversely to the contention of plaintiffs in error by every Court where such contention was made.

In *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 954, 959, the Circuit Court of Appeals for the Ninth Circuit said:

> "It is contended that the plaintiff had no right of action for the recovery of the difference between the greater charge for the short haul and the lesser charge for the long haul, because no such right of action existed at common law, and no such right of action has been conferred by the Constitution or statutes of California. The defendant cites the case of *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, a case in which the plaintiff sought to recover damages for discrimination in freight rates by sea between San Francisco and San Diego, alleging that the steamship company had favored a certain other shipper by charging him 12½ per cent. less than it did the plaintiff for freight on the same character and quantity of goods. The court, in view of the fact that there was no statutory or constitutional provision relating to the matter, and that there was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis, and the fact that the plaintiff had not alleged that the charge made was unreasonable, held that the plaintiff had no cause of action. That conclusion was influenced largely by the decision in *Great Western R. R. Co. v. Sutton*, 4 Eng. & Ir. App. 238, a case in which Mr. Justice Blackburn had said that at common

law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally, and that all that the law required was that he should not charge any more than was reasonable. *But in that case the court had under consideration the effect upon the common law of an act of Parliament fixing charges for railroad carriage and requiring uniformity of freight rates for goods of like description and quantity conveyed along the railway under like circumstances.* The action was for money had and received to recover charges alleged to have been improperly made against the plaintiff. Mr. Justice Blackburn said:

'The defendants may, subject to the limitations of their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. *And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.*'

"This quotation from the opinion in that case is directly in point in the present case, and it marks the vital distinction between *Cowden v. Pacific Coast S. S. Co.* and the case at bar. In the case at bar the obligation to refund is not based upon the common-law rule against unreasonable charges, *but is based upon the common-law rule which requires the re-*

payment of money which has been received in violation of an express statutory obligation, as in the case of *Great Western Railroad Co. v. Sutton*. In harmony with this view is *Louisville & N. R. R. Co. v. Walker*, 110 Ky. 961, 63 S. W. 20, in which the court held that a railroad company which charges more for a short than for a long haul, in violation of the constitutional provisions of that state, is liable to the shipper for the excess charged, 'as he whose money is taken from him illegally is to that extent damaged.' And in *Louisville & Nashville Ry. Co., v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, the court assumed without question the right of the plaintiff to sue for and recover the excess of payments made under like circumstances as in the case last cited from Kentucky.

"The difference between the case at bar and *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, and *Knudsen & Co. v. M. C. Ry.*, 148 Fed. 969, 79 C. C. A. 46, is that in those cases the damage to the plaintiff did not appear from the act of discrimination itself; the court holding that the fact that some other shipper was charged less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate, and that the measure of damages did not appear upon proof alone of the discrimination. *In the case at bar the measure of damages does distinctly appear. The effect of the constitutional provision is to fix a measure of charge and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor.*"

In *California Adjustment Company v. A. T. & S. F. Ry. Co.*, 179 Cal. 140, 153, the Supreme Court of California said:

> "Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one."

Here again plaintiffs in error cite *Parsons v. C. & N. W. R. R. Co.*, 167 U. S. 447, *supra*. What has been said in the foregoing part of this brief with reference to that case is also applicable here. The very quotation from the opinion of this Court which appears in the brief of plaintiffs in error shows that the case not only wholly fails to support their contention but is direct authority against it.

In the *Parsons* case the plaintiff shipped corn from certain Iowa points to Chicago. In holding that his complaint did not show a violation of the long and short haul claim this Court said:

> "There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places."

In another count of his complaint the plaintiff averred that he was entitled to damages because the

carrier did not publish its tariff. The theory of this cause of action was that if the carrier had posted its tariff at Iowa stations the plaintiff might have determined to ship his corn to the eastern points named in the tariff instead of to Chicago.

In describing this count of plaintiff's petition this Court said:

> "His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff."

It is with reference to this count of the petition that this Court used the language quoted at page 68 of the brief of plaintiffs in error. *This count was not to recover an overcharge arising from a violation of the fourth section but was to recover damages for the failure of the carrier to publish and post the tariff in question.*

If counsel had carefully read the opinion of this Court in the *Parsons* case they would not have been cited in support of this contention. The last portion of the excerpt from the opinion quoted in the brief of plaintiffs in error is the following:

> "So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and had been charged local rates he might have recovered any excess thereon over through

rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

Plaintiffs in error also cite *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, in support of this contention. That case was also cited in support of the same contention in the case of *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 954, 959 (C. C. A.), *supra*, where the Circuit Court of Appeals said:

"The difference between the case at bar and *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, and *Knudsen & Co. v. M. C. Ry.*, 148 Fed. 969, 79 C. C. A. 46, is that in those cases the damage to the plaintiff did not appear from the act of discrimination itself; the court holding that the fact that some other shipper was charged less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate, and that the measure of damages did not appear upon proof alone of the discrimination. In the case at bar the measure of damages does distinctly appear. The effect of the constitutional provision is to fix a measure of charge, and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor."

In *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, which was an action to recover

damages for rebating, this Court held that the plaintiff was entitled to damages, but that the measure of the damages was not necessarily the difference between the rate paid by plaintiff and the lower rate obtained by other shippers through a rebate. Plaintiff obtained judgment in the trial Court and the railroad company brought the case to this Court on writ of error. The plaintiff contended that as a matter of law it was entitled to recover as damages the difference between the rates which it paid and the lower rate accorded to other shippers by reason of rebates. *The plaintiff was in effect suing to obtain similar rebates.*

It appears that in the original Bill to Regulate Commerce, which passed the Senate May 12, 1886, it was provided that the carrier "should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period". This provision was omitted from the act as finally passed, and this Court held that the fact of this omission was conclusive against the plaintiff's claim.

In its opinion this Court said:

> Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged."

This Court further stated:

> "Making an illegal undercharge to one shipper did not license the carrier to make a

> similar undercharge to other shippers, and if having paid a rebate of 25 cents per ton to one customer, the carrier, in order to escape the suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have done so in order to equalize the two companies."

This Court further said:

> "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to statute, would make the carrier liable for damages beyond those inflicted and to persons not injured."

Let us contrast the section of the Interstate Commerce Act (viz., Sec. 2) under consideration in the case of *Penn. R. R. Co. v. International Coal Co., supra*, with the Fourth Section.

The Fourth Section makes it unlawful to charge more for the short haul than for the longer haul. Section 2 of the act is as follows:

> "Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under sub-

stantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The provision of the Fourth Section is for the benefit of the shipper, and confers upon him the right to have his property transported at charges not exceeding those made by the carrier to the more distant point. The provisions of Section 2 of the Interstate Commerce Act merely declares unlawful the charging of one shipper a lower rate than is charged another. *Clearly, Section 4 was intended to fix as the legal rate to the intermediate point the rate charged to the more distant point; but Section 2 of the Interstate Commerce Act does not purport to fix the legal rate for a particular service at the rate charged a favored shipper for the same service.*

Nevertheless this Court would probably have held the plaintiff in the case of *Penn. R. R. Co. v. International Coal Co., supra*, entitled to recover the difference between the charges paid by it and that paid by the favored shippers, if it had not been for certain considerations which the majority of the Court held to be controlling.

One of these considerations, already adverted to, was the fact that Section 2 of the bill as it originally passed the Senate, contained a provision that the carrier should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between

such higher rate and the lowest rate charged upon like shipments during the same period; but that such provision was omitted from the act as finally passed by Congress.

The violation of the act complained of in *Penn. R. R. Co. v. International Coal Co., supra,* was of the same character as the violation complained of in *Great Western Ry. Co. v. Sutton,* L. R. 4 H. L. 226 (1869), *supra,* where the English Courts held that the plaintiff was entitled to recover the difference between what he paid and the lesser amount charged to the favored shipper. *But the* English Act contained no provision similar to Section 8 of the Interstate Commerce Act.

Furthermore, the decision in Penn. R. R. Co. v. International Coal Co., supra, was based upon the law that the carrier was not lawfully entitled to charge a lower rate than the rate published in its tariff. By the Interstate Commerce Act the carrier is forbidden to charge more or less than the rate specified in its tariffs, whereas the Act of Parliament contained no such provision. Therefore the English Courts in *Great Western Ry. Co. v. Sutton, supra,* held, in effect, that the lower rate accorded to the favored shipper was the lawful rate. Having held that such lower rate was the lawful rate, it followed that any charge in excess of such rate was extortionate and recoverable in an action for money had and received. This is clearly pointed out by this Court in *Penn. R. R. Company v. Inter-*

national Coal Co., supra, where the Court, at page 202, said:

> "The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. *Denaby v. Manchester Ry. L. R.*, 11 App. Cases 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. *Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.*"

And herein lies the chief distinction between the right of the shipper here and the right of the shipper in the *International Coal Company* case, *supra. The tariff rate paid by the plaintiff in the International Coal Company case was the lawful rate; but the rate charged the plaintiff in this case was not the lawful rate, because expressly made unlawful by the Constitution.* In the *International Coal Co.* case, *supra,* the plaintiff sought to recover the difference between the lawful rate which it paid and the unlawful rate charged another shipper. *The plaintiff here was not seeking to recover the difference between a lawful rate which he paid*

and an unlawful rate paid by another person, but was seeking to recover the difference between the unlawful rate which he paid and the lawful rate which should have been charged.

In the case of the Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, *supra, this Court held that the giving of an unlawful rebate to one shipper did not fix the measure of the plaintiff's damage at the difference between the unlawfully low rate accorded the favored shipper and the lawful rate paid by plaintiff.*

But in the case at bar, the assignors of defendants in error were charged an unlawful rate. The damage to the assignors of defendants in error resulted as a matter of law.

A shipper who is required to pay a higher charge for the short haul than the carrier makes for the longer haul can sue for damages under the Interstate Commerce Act or he can sue to recover the overcharge. Section 8 of the act provides that if any common carrier shall do any act prohibited by the Interstate Commerce Act such common carrier shall be liable to the person injured thereby to the full amount of damages sustained in consequence of the violation of the act, together with a reasonable counsel's fee. The charging of more for the shorter haul is prohibited by the act. It is conceivable that in some cases the measure of the shipper's damage might be more than the amount of the over-

charge, but in every case such damage is at least the amount of the overcharge.

The Interstate Commerce Act recognizes the distinction between an action for damages and an action to recover an overcharge. This is pointed out by the Court in *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184 (see page 202), *supra*. If the overcharge is prohibited by the very terms of the act the shipper may elect to sue for damages or pursue his common law remedy; if the overcharge does not result from any direct violation of the terms of the act the shipper is confined to his common law remedy.

Section 22 of the act contains the following provision:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this Act are in addition to such remedies."

The Supreme Court of Missouri in *McGrew v. Missouri P. R. Co.*, 230 Mo. 496 (cited and quoted from by this Court in its decision in *Missouri P. R. Co. v. McGrew Coal Co.*, 244 U. S. 191) said:

> (230 Mo. 546.) "The Petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalties asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon paragraph 12 of article 12 of the Constitution.

without the aid of the Act of 1872, provided that said section of the Constitution is self-enforcing. Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, *then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance.*"

(561) "Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than 'the amount charged for any greater distance'. That declaration establishes a rule, and creates a right in every passenger and shipper to a compliance with, and an (199) obedience to, its terms. . . . Said section has the same force and effect as if it read: 'It shall not be lawful in this state for any railroad company to charge, under penalties which the general assembly shall prescribe, for freight or passengers, a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance.' Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading."

Referring to this decision of the Missouri Court, this Court in *Missouri P. R. Co. v. McGrew Coal Co., supra,* said (page 199):

> "As construed and applied in the present cause, this section prohibits the carrier from charging in respect of intrastate commerce more for a shorter haul than for a longer one over any portion of its line within the state, without regard to direction, circumstance, or condition; and if this inhibition is disobeyed the shipper acquires an absolute right to recover any *overcharge* paid by him" (italics ours).

The case of *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, *supra*, was a writ of error to the Circuit Court of Appeals to the Third Circuit to review the judgment of that Court in *Penn. R. R. Co. v. International Coal Co.*, 173 Fed. 1, 7 (C. C. A.). This Court held that the Circuit Court of Appeals erred in certain particulars and remanded the case to the trial Court for a new trial. This Court, however, did not criticize the portion of the opinion of the Circuit Court of Appeals which reads as follows:

> "It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. *This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful.* Thus Section 2 provides:
>
> > 'Such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful',

and creates a statutory right to recover, not of the freight paid, but of damages, viz.:

> 'Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.'

From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by Section 8 on the carrier, who shall 'do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful', and we may add, having conferred such right of action without imposing the precedent condition of protest, it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States v. Bank of Washington*, 6 Pet. 17, 8 L. Ed. 299, where it was said:

> 'Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake.' "

It is unnecessary for a shipper to make protest to a carrier at the time of the payment of an over-

charge. The carrier is in the superior position and the payment is in law deemed to be involuntary.

See:

S. P. Co. v. California Adjustment Co., 237 Fed. 954 (C. C. A.);

Mobile v. Steiner, 61 Ala. 571;

Chicago & Alton v. C. V. & W. Coal Co., 79 Ill. 121;

Penn. R. Co. v. International, 173 Fed. 1 (C. C. A.);

Heiserman v. Burlington, 18 N. W. 903.

To the effect that the charging of more for the short than for the long haul is an overcharge, see:

Louisville & Nashville Ry. v. Eubanks, 184 U. S. 27;

Union Pacific v. Goodridge, 149 U. S. 680.

Respectfully submitted,

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Amici Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error,
No. [redacted] 1

and

JAMES C. DAVIS,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.
No. [redacted] 1

BRIEF OF DEFENDANT IN ERROR

Upon Writs of Error to the U. S. Circuit Court of Appeals for the Ninth Circuit

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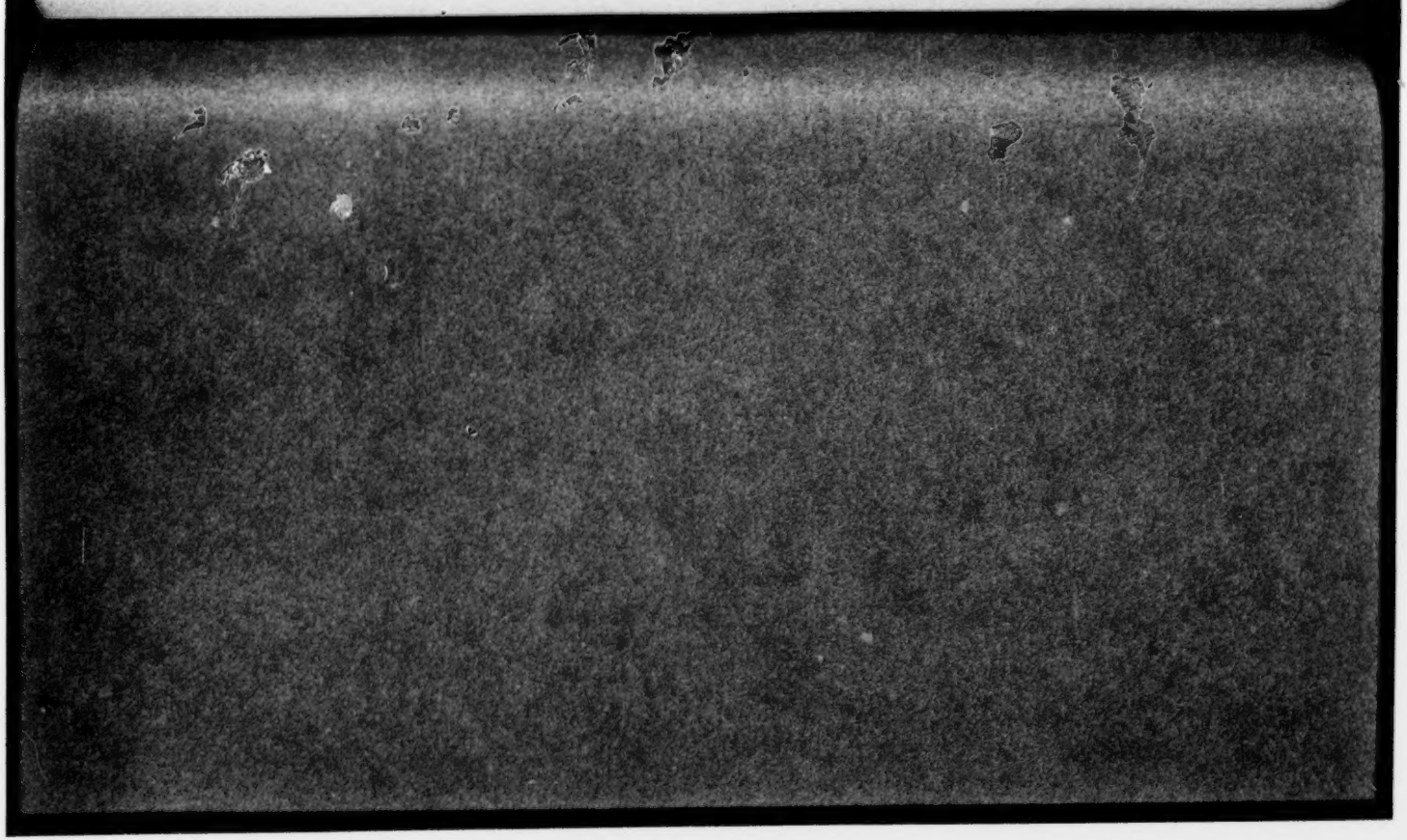

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In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error,
No. 594

and

JAMES C. DAVIS,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.
No. 595

BRIEF OF DEFENDANT IN ERROR

Upon Writs of Error to the U. S. Circuit Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASES

These cases were consolidated for hearing in both courts below and application will be made for consolidation for hearing in this Court. They involve the same facts. The first covers the period prior to and subsequent to Federal Control, and the second covers the period during Federal Control. Both cases are actions for damages for violation of the long and short haul clause of the 4th Section of the Act to Regulate Commerce. They involve rates on sugar in carload lots from San Francisco, California, to Portland, Oregon.

The shipments in question here all moved via the line of the San Francisco and Portland Steamship Company from San Francisco to Portland. The vessels of this company ply from San Francisco to Portland via Pacific Ocean, up the Columbia River to the mouth of the Willamette, thence up the Willamette River to Portland. The station of North Portland is located on the Columbia Slough about five miles above the junction of the Willamette and Columbia Rivers. (Tr. No. 594, p. 63.) The steamers of the San Francisco and Portland Steamship Company do not go to North Portland, but turn into the Willamette River five miles short thereof. Neither the San Francisco and Portland Steamship Company nor the Director General published any rates to North Portland. The regular landing place at Portland of the steamers of the San Francisco and Portland Steamship Company is at the Ainsworth Dock, where it connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company. The line of railroad of said last named company extends from Portland to North Portland, and this is the only route via which any rates were published from San Francisco to North Portland in connection with the steamship line of the San Francisco and Portland Steamship Company.

On February 17th, 1916, the San Francisco and Portland Steamship Company, in connection with the O-W. R. & N. Co., put into effect a rate on sugar in carload lots of a minimum weight of 30,000 pounds, of 12½c per cwt. This rate applied via the line of the San Francisco and Portland Steamship Company to Portland, thence via the O-W. R. & N. to North Portland.

This rate continued in effect until June 25th, 1918. During all of this time on all shipments of sugar in carload lots of 30,000 lbs., from San Francisco to Portland and Astoria, Oregon, a point at the mouth of the Columbia River, the S. F. & P. S. S. Co. charged 15c per cwt.

On June 25th, 1918, the rate to North Portland was raised to 15½c per cwt., which continued in effect until August 26th, 1920. During this period the S. F. & P. S. S. Co. charged on all shipments to Portland and Astoria 19c per cwt.

From August 26th, 1920, during the balance of the period covered by the complaints, the rate from San Francisco to North Portland was 19½c per cwt. and the charge during this period made by the Steamship Company from San Francisco to Portland and Astoria was 24c per cwt.

The excess charge to Portland and Astoria, therefore, was 2½c per cwt. up to June 25th, 1918; 3½c per cwt. between June 25th, 1918, and August 26th, 1920; and 4½c subsequent to August 26th, 1920.

The route over which the sugar here involved was shipped from San Francisco to Portland and Astoria was the same as that over which the lower rate was established to North Portland, Portland and Astoria being intermediate between San Francisco and North Portland.

There is no dispute between the parties as to the shipments moving, nor as to the amount that would have been charged on the same shipments over the same route had they moved on to North Portland—that is, to the excess charges collected at Portland and Astoria for the transportation of such shipments over the rate established for the same commodity from San Francisco to North Portland.

The District Court rendered judgment in the case against the San Francisco and Portland Steamship Company in favor of the defendant in error in the sum of $11,380.69, with interest from dates of payment, together with $2,000 attorney's fees for services in the District Court, and costs and disbursements, and in the case against the Director General the lower court rendered judgment in favor of the defendant in error in the sum of $7,339.06, with interest from dates of payment, and $1,500 attorney's fees for services in that court, together with costs and disbursements. The Circuit Court of Appeals affirmed the judgment with $1000 additional attorney's fees in that Court in No. 594, and $600 additional attorney's fees in No. 595.

ARGUMENT

The basis upon which the plaintiff (defendant in error), based his cause of action and upon which recovery was had herein, is that the San Francisco and Portland Steamship Company, although a water carrier, is controlled by the ownership of all its stock by the Oregon-Washington Railroad & Navigation Company, an interstate rail carrier. That said Railroad Company had applied to the Interstate Commerce Commission, under Section 5 of the Act to Regulate Commerce, as amended by the Act of Congress of August 24, 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal, and the Sanitation and Government of the Canal Zone," for permission to continue the ownership and control of said steamship line, and to continue the operation thereof, and that under said Act and the permission granted by the Interstate Commerce Commission, said company became subject to all of the terms of the Interstate Commerce Act with reference to filing tariffs, maintaining its rates, and complying with the long and short haul clause of said Act.

That said steamship line had charged rates to Portland, Oregon, on sugar in carload lots higher than its joint rate established in connection with the Oregon-Washington Railroad & Navigation Co. from San Francisco to North Portland; that the route established over which said rate applied was through Portland, and hence said steamship line while operating the same had charged more for the short haul over the same route in the same direction than it charged over the longer haul, the shorter being included within the longer.

The measure of damages sought and permitted to be recovered was the difference in the rate established to the longer point over that charged to the shorter point. In addition, the plaintiff sought and was allowed reasonable attorney's fees under Section 8 of the Interstate Commerce Act, which provides that the Court in case of recovery shall allow a reasonable attorney's fee as a part of the costs in any case where recovery is had for violation of the Interstate Commerce Act.

The points of defense contended for here by the defendants (plaintiffs in error), are:

First: That the transportation being wholly by water, the defendants were not subject to the provisions of the Act to Regulate Commerce.

Second: As to the case against the Director General that the plaintiff, being the assignee of the claims sued on was not entitled to recover, because the assignments were void as not complying with Section 3477 of the revised statute, which provides against assignment of claims against the government, except in certain cases and only in case the assignment is executed with certain formalities.

Third: That the steamship line was handled during a certain period for account of the United States Shipping Board, and that no recovery during this period could be had.

Fourth: That the question as to whether the long rate was a reasonable rate, or the short rate a reasonable

rate involves an administrative question, and hence the exclusive jurisdiction of such question under the Act to Regulate Commerce was lodged in the Interstate Commerce Commission, and that the courts had no jurisdiction to entertain the actions.

Fifth: That the 4th Section of the Act to Regulate Commerce was not violated because there was another physical connection over which the shipments could have reached North Portland without being transported into the regular landing place of the San Francisco and Portland Steamship Company at Portland and there transferred to the Oregon-Washington Railroad & Navigation Company for further transportation to North Portland.

Sixth: That the measure of damages is not the difference in the rates to the two points and that no damages could be allowed because there was no alleged proof of actual damage, and

Seventh: That all claims for shipments moving more than two years prior to the filing of the complaint were barred by the Statute of Limitations.

We will first discuss the question which has been the main bone of contention throughout all of the courts, to-wit, whether or not the courts have jurisdiction thereover, or whether the exclusive jurisdiction of such question is lodged with the Interstate Commerce Commission.

I.

THE DISTRICT COURT HAD JURISDICTION IN THESE CASES

At the outset we will state that the Interstate Commerce Commission has had before it a number of cases of violation of the long and short haul clause of the 4th Section of the Act to Regulate Commerce. It has held in these cases that no recovery may be had against the carrier for a violation of the statute unless the shipper proves that he has been specially damaged by loss of sales or injury to his business, and has refused to grant damages in the amount the shipper has been charged over and above the rate to the longer point. There have been a number of dissenting opinions by lawyer members of the Commission to this ruling, so that the opinion of the Commission is not unanimous. The courts, on the other hand, in all cases which we have found have granted damages in the difference of the two rates. The Commission justifies its holding under the decision of this court in Pa. R. R. Co. vs. International Coal Co., 230 U. S. 184, which we will discuss in the later part of this brief.

The Fourth Section of the Act to Regulate Commerce, at the time these shipments moved, so far as is applicable to this case, reads:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer

distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates, subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance. Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this Section." 4 Fed. Stat. Ann. 2nd Ed. 396.

Prior to the amendment of 1910, Section 4 had inserted after the words "or of like kind of property" the words "under substantially similar circumstances and conditions." This Act, as interpreted prior to the amendment of 1910, gave the right to the carriers in the first instance to determine whether or not dissimilarity of circumstances and conditions existed which authorized them to charge more for the shorter than for the longer haul over the same line, and if on a hearing the carrier was able to prove a dissimilarity of conditions warranting the higher charge to the intermediate point, it was not subjected to any penalty. But by the amendment of

1910 this right of determination by the carrier in the first instance was taken away from it, and the prohibition of the long and short haul clause made absolute until a hearing before the Commission and an order permitting the higher rate to the intermediate point. That this amendment took away from the carriers the right in the first instance to decide the relativity of such rates, and establish a higher rate to the intermediate point, with the right to justify such rate, when called in question in a judicial proceeding is decided by the U. S. Supreme Court in the Intermountain Rate Cases, 234 U. S. 476.

The changes made by the amendment of this section in 1910 are set out in full on pages 480 and 481 of 234 U. S. On page 482 with reference to the practice before this amendment, the court said:

> "Almost immediately after the adoption of the Act to Regulate Commerce in 1887, the Interstate Commerce Commission in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words 'under substantially similar circumstances and conditions' of the fourth section dominated the long and short-haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul. * * * We say primarily because of course it was further recognized that the authority existing in carriers to the end

just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. * * * These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin."

And again at page 484 the court says:

"With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, *thereby leaving the long and short-haul clause in a sense unqualified* except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' "

The court then points out that the change brought about by the amendment was to shift from the carrier to the Commission the determination of when the carrier may be relieved from the strict prohibition of the statute and says:

"That is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist* because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections."

In the case of United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, the court had before it certain rebilling rates in the consideration of which the question of the long and short-haul clause arose. The Interstate Commerce Commission had passed an order which had been enjoined by the Commerce Court and in considering the rates the court said, page 322:

> "We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege since we are of the opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute and was therefore not a preference, *the right to continue it had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given.* The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of Section 4 of the Act to Regulate Commerce, and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by the statute *ceased to exist after the adoption of the amendment of Section 4 by the Act of June 18, 1910.* * * * This results from the fact that by the amendment in question the original power to

determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted *that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.*"

Again in the case of Skinner & Eddy Corp. vs. U. S., 249 U. S. 566, in considering the amendment to the long and short haul clause of the Act, the Supreme Court said:

"A special group of cases in which the Commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long and short haul clause. It was enacted to remedy one large class of discriminations by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust. As originally enacted, the provision was construed to authorize the carrier to determine primarily whether the required dissimilarity of circumstances and conditions existed and also to authorize the acceptance of competitive conditions as a justification of a lower rate for the longer distance. So construed, the provisions proved

inefficacious, and the act was amended in 1910 by striking out the 'substantially similar circumstances and conditions' clause and making the prohibition absolute except to 'the extent to which such designated common carrier may be relieved from the operation of this section' by the Commission. Intermountain Rate Cases, supra."

It is, therefore, settled and determined that by the amendment of the Fourth Section as interpreted by this Court that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer, the shorter being included within the longer distance, until it presents the matter to the Interstate Commerce Commission and gets an order of the Commission permitting such greater charge to the shorter point. In the present cases no such permission was obtained, and therefore the greater charge to the shorter point was illegal, it being expressly prohibited by the statute.

It is contended by the plaintiffs in error that the question as to which rate is illegal, that is, the rate to the shorter point or the one to the longer point, is an administrative question, and therefore must be submitted to the Interstate Commerce Commission for its ruling prior to any action in court. This contention is based upon the principle announced by the U. S. Supreme Court in Texas & Pacific Ry. Co. vs. Avilene Cotton Oil Co., 204 U. S. 426, and other cases following that principle. But, as stated by the District Court, this principle applies "where the legal quality of the practices com-

plained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction." Where, however, the practice is directly prohibited by statute, the person injured thereby need not go originally to the Commission but may sue directly in court.

Penn. Railroad Co. vs. International Coal Co., 230 U. S. 184.

Penn. Railroad Co. vs. Puritan Coal Co., 237 U. S. 121.

Penn. Railroad Co. vs. Somner, 242 U. S. 120.

The principle is well illustrated by the three cases decided on the same day found in 230 U. S. The first is that of Pennsylvania Railroad Company vs. International Coal Company, 230 U. S. 184, the second that of Mitchell Coal Co. vs. Pennsylvania Railroad Co., 230 U. S. 247, and the third that of Morrisdale Coal Co. vs. Pennsylvania Railroad Co., 230 U. S. 304.

The first of these cases was one instituted by a shipper to recover damages on account of rebates given to plaintiff's competitor. The contention was made that the court had no jurisdiction and that the case should be remanded with instructions to dismiss the complaint "upon the ground that the court had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and

contract coal. It argued that this was a rate making question and that it was for the Commission as the rate regulating body to determine not only whether a dissimilarity existed but whether the rates were properly adjusted to meet that dissimilarity." (230 U. S. 196.) The court then points out that there are many acts of the carriers which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust, and that determination of such issues is an administrative question and calls for the exercise of the discretion of the administrative and rate-making body, and then says:

> "None of these considerations, however, operates to defeat the court's jurisdiction in the present case, for even if a difference in rates could be made between free and contract coal, *none was made in the only way in which it could have been lawfully done.* The published tariffs made no distinction between contract coal and free coal but named one rate for all alike. That being true, *only that single rate could be charged.* When collected, it was unlawful under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. * * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

This Court in that case sustained the jurisdiction of the court to recover any damages caused by the unlawful rebating to the competing Coal Company.

In the case of Mitchell Coal Co. vs. Pennsylvania Railroad Co., immediately following this decision, the court denied relief because under the tariff the Railroad Company was paying certain allowances in connection with certain services, and held that as the services were provided for in the tariff, the reasonablesness of such allowances was within the primary jurisdiction of the Commission and the courts could not allow damages to a competitor until he had established before the Commission the unreasonableness of the rule under which the allowances were made.

In the Morrisdale Coal Co. case this Court denied the jurisdiction of the courts to allow damages for discrimination in distribution of cars under rules established and filed with the Interstate Commerce Commission until the Interstate Commerce Commission had investigated the reasonableness of the rules and declared them unreasonable.

This principle is further illustrated in Pennsylvania Railroad Company vs. Puritan Coal Co., 237 U. S. 121, and the primary jurisdiction of the court sustained on the ground that the plaintiff was not attacking the reasonablesness of the rule established for the distribution of cars, but was attacking the manner in which the cars were distributed under the rule, and sustained the right of a shipper in the latter case to apply directly to the

court, and this principle is further amplified and clarified in the case of Pennsylvania Railroad Co. vs. Sonman Coal Co., 242 U. S. 120, which was also a car distribution case and where the shipper was attacking not the reasonableness of the rule for distribution but the manner in which the Railroad Company distributed its cars under the rule established. In this latter case the court says (242 U. S. 124):

> "Thus we have heard * * * that the Act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal Courts is otherwise made exclusive; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but *where the assault is not against the rule* but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission."

A later expression of this Court is in the case of St. Louis, Iron Mountain & Southern Railway Co. vs. J. F. Hasty & Sons, 255 U. S. 252, in which the interpretation of a tariff was involved, and in which the question of

whether or not material called rough heading for barrels came within an item of the tariff providing a rate "on rough lumber, staves, flitches, bolts, and logs." This Court decided that it did come within that provision of the tariff, and with reference to its being an administrative question, the court says:

> "The matter is so free from doubt that there is no occasion to apply to the Commission for a construction, as insisted by appellant under Texas & Pacific Ry. vs. American Tie Co., 234 U. S. 138, 146."

The last expression of this court which we have found on this matter is Great Nor. Ry. Co. vs. Merchants Elevator Co., 259 U. S. 285-296, in which a question as to the right of the court to interpret a tariff on which there was a doubt as to whether the general rule or an exception to the rule applied to the particular shipments in question, and the court reviews at considerable length its former decisions and reaffirms the principle holding that in such cases the court had original jurisdiction.

The rule seems clearly established that if the cause of action depends upon the requirements of a change in the established rules or tariffs of the carrier, then the matter of determining the reasonableness of such rules or tariffs is an administrative question and must go before the Commission before action may be brought thereon in court. If, however, the party is simply seeking a right under the established rules or tariffs or the enforcement of a statute which prescribes the rule, the injured party may apply directly to the court for the enforcement thereof, there is no administrative question

involved. It is simply an application of the established rule or statute.

In the present case the statute specifically declares that the carrier shall not charge more for the long haul than for the short haul. There is no dispute as to the fact that the shipments moved, that the carriers charged a higher rate to Portland and Astoria, the short points, than its established rate to North Portland. There is no dispute of the fact that it had not secured an order of the Interstate Commerce Commission permitting a higher charge to the shorter points, and we submit that there is no administrative question involved, but simply the enforcement of the rule laid down by the statute. The rate so established violated the provisions of the long and short haul clause.

Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the provision of this Act shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby to the full amount of damages sustained in consequence in violation of the provision of this Act, together with reasonable counsel's or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as a part of the costs in the case.

Section 9 of the Act give the right to any person claiming to be damaged to make complaint either to the

Commission or to bring suit for damages in the District Court of the United States.

Under the principle above announced as to the cases which may be brought directly in the courts and those which must be brought primarily before the Commission, we are seeking damages for violation of the long and short haul clause. The statute makes the prohibition, we have proved the violation of it, there is no administrative question involved, and we are entitled to sue directly in the court.

II.

THE TRANSPORTATION, THOUGH WHOLLY BY WATER, IS SUBJECT TO THE INTERSTATE COMMERCE ACT

It is contended in plaintiff's brief that because the transportation was wholly by water that it is not subject to the Act, but we submit that this is absolutely untenable, and that the carrier has accepted the provisions of the Interstate Commerce Act and made itself liable thereto. The record shows that the Oregon-Washington Railroad & Navigation Company, as owner of all of the stock of the San Francisco and Portland Steamship Company had applied to the Interstate Commerce Commission, under Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act, to be permitted to continue the operation of this line as a public convenience, and permission was granted by the Interstate Commerce Commission. (Tr. No. 594, P. 61, Tr. No. 595, P. 55—Plaintiff's Exhibit 2 in both cases.)

This application and the permit granted was in direct compliance with the Panama Canal Act, and the steamship company has complied therewith by filing its tariffs. It should not now after invoking the provisions of this act and holding itself out to the public as subject thereto, be heard to say that it is not bound by the provisions of the act. Section 11 of the Panama Canal Act of August 24th, 1912, 37 Stat. L. Page 566, provides that Section 5 of the Act to Regulate Commerce should be amended as follows:

> "From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

It is contended by the plaintiffs in error that the provisions of the Panama Canal Act immediately following this amendment did not in fact amend the Interstate Commerce Act. In any event, it was a solemn act of Congress and provided as follows:

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Reg-

ulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation"
* * *

There is nothing inconsistent with the provisions of this act and the other provisions of the Interstate Commerce Act as attempted to be maintained by plaintiffs in error. It applies to those water carriers owned or controlled by rail carriers subject to the act. The evils aimed at were the practices of rail carriers in maintaining water lines so as to prevent any water competition and for the purpose of protecting their rail traffic against such water competition, and the act of Congress was designed to bring any such water carriers under the provisions of the act. The plaintiffs in error accepted the law and complied with it, and it seems to us that the language is so plain that it cannot possibly be construed as to except the water carrier when the transportation is wholly by water and subject to the Interstate Commerce Act only when it enters into a joint rate with the rail carrier. Such transportation is subject to the Act and was made so subject to the act prior to the enactment of the Panama Canal statute by the amendment of Section 1 in 1906.

We submit that Congress had only in mind the subjecting of railroad owned water carriers to the full terms of the Interstate Commerce Act as to all of its business. Otherwise, the evil at which these provisions of the Panama Canal Act were aimed would have been permitted to continue after the enactment of the statute as well as before, for such carriers could have been used wholly to destroy competition. The railroad company could have

run its vessels only when some other carrier came on to a route and cut rates so as to kill off the competition, leaving the railroad carrier's business unmolested. The whole object and purpose of the provisions of the Act, as shown by its wording was to preserve such water competition and not to kill it and Congress took the means to preserve it by subjecting such railroad owned carrier to the full measure of the provisions of the Interstate Commerce Act.

We therefore submit that the transportation between San Francisco, Astoria and Portland, while wholly by water is when carried in the railroad controlled vessels, in all respects subject to the Act.

III.

ASSIGNMENT OF CLAIMS

It is claimed in the brief of plaintiffs in error that the assignment of all the claims of the shippers to the defendant in error was void because not complying with Section 3477 of the revised statute. This objection refers only to the case against the Director General. We submit, however, that this question is not before this court for the reason that it was not raised in the lower court. The only reference in the bill of exceptions thereto is found in Tr. No. 595 at Page 54 and is as follows:

> "Mr. Wilson offered documentary evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action."

There was no objection made to the assignments when offered and no exception taken with reference thereto. The sufficiency of said assignments was conceded. No question was likewise raised in the Circuit Court of Appeals and neither of the lower courts were called upon as to the validity of said assignments.

Notwithstanding the fact that this question is not raised by the record, we submit that claims of this character may be brought by the assignee. In the case of Spiller vs. A. T. & S. F., 253 U. S. 134, this court has sustained the right of an assignee to maintain an action against a carrier on such claims. The fact that the Director General was operating the line we submit did not prevent the assignment. Section 10 of the Federal Control Act provides:

> "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or any other act applicable to such federal control or with any order of the president. Actions at law or suits in equity may be brought by it against such carriers and judgments rendered as now provided by law and in actions at law or suits in equity against the carrier *no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

The defense of the invalidity of the assignments is a defense based purely and simply upon the ground that the defendant is an instrumentality or agency of the Federal Government.

This court has held in the Spiller case above shown that such assignments are valid as against a carrier not under federal control and if assigned claims may be maintained against such carrier, then it was plainly the intent that such assigned claims could be maintained against the carrier when under federal control.

This court in Mo. Pacific R. R. Co. vs. Ault, 256 U. S. 559, in construing this section says:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers * * * Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having deal-

ings with the carriers were not to be affected by the change of control."

The court further amplifies this language.

In another action pending before the District Court of the United States for the District of Oregon this identical question was raised and Judge Wolverton held the assignments valid. Parrington vs. Davis, 285 Fed. 751.

In Seaboard Air Line Railway vs. United States, 256 U. S. 655, this court discussed the reason for the provisions of Section 3744 of the revised statute and holds that it does not apply in case of the consolidation authorized by statutes of two states.

We submit that the assignments were not void but action could be maintained thereon against the carriers while under federal control.

IV.

CARRIERS ARE LIABLE NOTWITHSTANDING CERTAIN OF THE BOATS ON WHICH PART OF THE SUGAR WAS HANDLED WERE UNDER REQUISITION OF THE UNITED STATES SHIPPING BOARD FOR A PORTION OF THE PERIOD.

It appears in the record (Tr. No. 595, P. 84) (No. 594, P. 90), that on October 12th, 1917, the San Francisco and Portland Steamship Company was given notice by Bainbridge Colby, Commissioner, that the

United States Shipping Board was requisitioning all American steamers enumerated therein, and that the "Rose City" and "Beaver" of the San Francisco and Portland Steamship Company were of the class requisitioned. These steamers continued on their routes and were continued to be operated by the San Francisco and Portland Steamship Company and the United States Railroad Administration. The tariffs under which shipments were carried were the tariffs of the San Francisco and Portland Steamship Company and the Director General. The contracts of carriage as shown by the evidence were the contracts of the San Francisco and Portland Steamship Company and the Director General; the agents receiving the shipments were the employes of these concerns. No tariffs were filed by the United States Shipping Board with the Interstate Commerce Commission, and no contracts of carriage were issued by that Company. The shippers therefore had no contractual relations with the United States Shipping Board, were never advised in any way that they were dealing with the United States Shipping Board. The contracts which gave rise to these actions were by the shippers and the plaintiffs in error in this case and no other. It made no difference to the shipper what boats its contractors used for the transportation of these shipments, and if these plaintiffs in error saw fit to contract with the public during this period they were liable to the public on those contracts, notwithstanding two of their boats had been requisitioned by the Government, and notwithstanding they may have carried the articles on the requisitioned boats. Their tariffs holding themselves out to the public as carriers during this entire period were on file and anyone having traffic to haul could rely thereon.

We therefore submit they still remained liable during this period to the plaintiff's assignors.

V.

NORTH PORTLAND AND PORTLAND ARE ON THE SAME ROUTE, PORTLAND BEING INTERMEDIATE, ON SHIPMENTS FROM SAN FRANCISCO TO NORTH PORTLAND.

It is claimed by plaintiffs in error that because the boats of the San Francisco and Portland Steamship Company might have run beyond the mouth of the Willamette River up to North Portland and delivered the shipments, or could have transferred the same through the terminal of the City of Portland without bringing them up to the vessels' regular landing place at Portland and there transferring to the line of the Oregon-Washington Railroad & Navigation Company that Portland is not intermediate from San Francisco to North Portland and therefore it was no violation of the Act.

Neither one of these contentions is tenable for the reason that the San Francisco and Portland Steamship Company does not include North Portland in its tariffs except via Portland and the Oregon-Washington Railroad & Navigation line.

As heretofore pointed out, North Portland is farther East than the mouth of the Columbia River where the boats of the San Francisco and Portland Steamship Company turn South into the Willamette River to Portland. The tariffs of the San Francisco and Portland

Steamship Company not naming North Portland as one of the stations on its boat line, cannot carry traffic thereto. The very first provision of Section 6 of the Act to Regulate Commerce provides:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established * * * The schedules printed as aforesaid by any such common carrier *shall plainly state the places between which property and passengers will be carried*" * * *

Not having named North Portland as one of the places to which it would carry freight by its own boats, that was not an available route for such transportation under the Interstate Commerce Act.

The route through the Munipical Terminal was likewise not an available route. The Municipal Terminal is located on the Willamette River, partly within and partly without the city limits of Portland. It is north of the regular landing place of the San Francisco and Portland Steamship Company vessels at Portland and can be reached on the route from San Francisco to the steamship company's regular landing place at Portland before reaching that landing. At the Municipal Terminal, which is owned and operated by the City of Portland, there are slips for the accommodation of vessels, and tracks from

these slips to a connection with the O.-W. R. R. & N. line. Over these tracks are operated switch engines of the City of Portland, and the nearest slip from the line of the O.-W. R. R. & N. Co. would involve a haul over these tracks of the City of Portland of at least 2,000 feet. The tariff of the City of Portland for the use of these terminal facilities is not filed with the Interstate Commerce Commission (Tr. No. 594, P. 85, and No. 595, P. 80). As stated by the witness Mount, "The tariffs of the City of Portland change oftener than the moon does". (Tr. No. 594, P. 85, and No. 595, P. 80.)

The route from San Francisco to North Portland via the San Francisco and Portland Steamship line, the Portland Municipal Terminal and the Oregon-Washington Railroad & Navigation Company was not an available route because the tariffs over that route were not filed with the Interstate Commerce Commission. Subdivision 4 of Section 6 of the Interstate Commerce Act provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission," etc. * * *

Subdivision 7 of Section 6 of the Act to Regulate Commerce provides:

> "No carrier, unless otherwise provided by this Act, shall *engage or participate* in the transportation of passengers or property, as defined in this

> Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act." * * *

The tariff involved in this case does not and no other tariff shown by the record permits the carrying of property through Municipal Terminal No. 4 of the City of Portland from San Francisco to North Portland because the City of Portland over that route would be a participating carrier, and the law requires it to join in the tariff, and neither the San Francisco and Portland Steamship Company nor the Oregon-Washington Railroad & Navigation Company could publish a tariff over that route without the participation of the City of Portland in the tariff.

There is another reason against the consideration of this route and that is that the Municipal Terminal of the City of Portland was not in existence until the spring of 1919, long after the rates and route to North Portland through Portland were established. The fact is, the tariffs in question from San Francisco to North Portland in this case definitely fix the route. These tariffs specify that this rate applies "via Route No. 1 as shown on Page 34", and on that page under the caption of "Routing", Route No. 1 is specified as "via the San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland", (Tr. No. 594, P. 64, and No. 595, P. 58). This route was established long before the Portland Municipal Terminal was in existence. The claim that the Municipal Terminal route is an available route is a

makeshift in an attempt to avoid the penalty of the 4th Section.

Mr. J. W. Mount, Assistant General Freight Agent of the Union Pacific, a witness on behalf of the plaintiffs in error, when on the stand on cross examination on the subject of the City of Portland joining in the tariffs, said:

> "All sugar going on the Oregon-Washington Railroad & Navigation Company's lines coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically, sugar can transfer from water to rail at Municipal Dock No. 4, and that it is just as good, if not a better physical connection than the Ainsworth Dock." (Tr. No. 594, P. 88, No. 595, P. 83.)

It requires something more than a physical connection to establish a route within the meaning of the Interstate Commerce Act. Via the only established route as shown by the tariffs on file with the Interstate Commerce Commission, the route to North Portland is through Portland, and Portland is therefore intermediate to North Portland and a charging via this route, as was shown by the evidence in this case, of a lower rate to North Portland than that charged to Portland is a violation of the 4th Section of the Interstate Commerce Act.

VI.

THE ACTUAL SHOWING THAT SHIPMENTS HAVE BEEN MADE TO NORTH PORTLAND AS A CONDITION TO RECOVERY IS NOT NECESSARY.

The question was raised by the plaintiffs in error that because the defendant had not shown actual movements to North Portland that no violation of the Act was shown.

At North Portland is located a packing plant of Swift & Company, in which quantities of sugar are used. The San Francisco and Portland Steamship Company joined with the Oregon-Washington Railroad & Navigation Company in establishing a joint rate thereto. The law requires, as pointed out in the foregoing section of this brief, the carriers to "print and keep open to public inspection, all rates, fares and charges for transportation between different points" * * * It is claimed that because Section 4 of the Act provides that it shall be unlawful for any carrier "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance", before recovery can be had that it must be proved that not only the carrier publishes rates to the further point, but that it must also be proved that it has actually charged those rates. This would in many cases be an impossibility. The law requires the publication of the rates and charges to be made. It requires the carriers to keep them open to public inspection. They cannot be changed except by

special permission of the Interstate Commerce Commission in emergency cases under thirty days' notice. The public is bound to take notice thereof. It has a right to rely upon this publication of the carrier and when it publishes the lower rate to the further point, unless it gets special permission therefor from the Interstate Commerce Commission the higher rate to the intermediate point ceases to exist.

In United States vs. Louisville & Nashville, 235 U. S. 322, this court says:

> "The right to continue it" (That is, the greater charge for the shorter distance), "had been expressly prohibited by statute until on application made to the Commission its consent to that end was given."

And again, at Page 325, Mr. Chief Justice White says with reference to the long and short haul clause * * * "and for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.* Int. Mountain Rate Cases, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful

and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The above language was used with reference to rates in effect at the time the amendment of 1910 of the 4th Section of the Act went into effect. In the present case the lower rate to the further point was established after the amendment of 1910 went into effect. If a rate in existence at the time of the amendment could not continue after a certain date without the authority of an order of the Interstate Commerce Commission, then certainly a subsequently established higher rate to the intermediate point, without first securing the Commission's order could not become effective. The only rate therefore which could have been legally charged in view of this prohibition of the statute was the lower rate established to the further point, because the other rate by the establishment of this rate to the further point became illegal, and therefore we submit it did not devolve upon the shipper to prove an actual shipment to the further point.

This question has been considered by the Supreme Court of California with reference to the long and short haul provision of the California law in California Adjustment Co. vs. A. T. & S. F., 179 Cal. 140, 175 Pac. 682. An examination of this case will show that the language of the California law in this respect is identical with that of the Interstate Commerce Act. With reference thereto that court says:

> "Nor do we think it material, whether when the shipments to intermediate points complained of as excessively charged for were made no contempo-

raneous shipment to the more distant point was made. Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one. Actual shipment for the longer distance is not required to be shown. All that is required is a showing that the defendant held out and published to the shipping world that it would charge certain rates for the transportation of a certain class of merchandise from San Francisco to Los Angeles. This was shown, and when shown, for the purpose of determining whether discrimination was practised or not, the rates so held out to be charged are deemed in law to have been charged."

The Supreme Court of Ohio likewise in Beeghly vs. Public Utilities Commission (135 N. E. 641), passing upon a similar long and short haul provision of the Ohio law, arrives at the same conclusion.

VII.

STATUTE OF LIMITATIONS

It is claimed that certain of the claims sued on in Docket No. 594 are barred by the Statute of Limitations, for the reason that the action was not commenced within two years after movement thereof. In the brief this same question is raised with reference to certain of the claims in Docket No. 595, but the record in the lower court in this Docket does not raise that question.

In Docket No. 595 there was submitted a demurrer in the following words:

> "Comes now the above named defendant and demurs to the complaint on file herein on the ground that
>
> I.
>
> "This Court has no jurisdiction of the subject matter of the action.
>
> "Defendant will rely in presenting this demurrer on the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of controversies of this character." (Transcript 595, Page 21.)

No general demurrer or demurrer on the ground that the action had not been commenced as to any of the claims within the time prescribed was filed. The answer is simply one of general denial, except that by special answer it is suggested that James C. Davis had succeeded John Barton Payne. (Transcript 595, Pages 35 to 38.)

At the time of the trial no objection was made to any of the claims, nor was any such question raised. In fact, the claims had all been submitted to the defendant, checked, and the amount agreed upon. The only reservation made was that certain claims had been carried during the time after the Shipping Board had wired requisitioning certain steamers of the plaintiff in error and prior to the date when the notice of release of said vessels was sent, but no question as to any of said claims not being within the Statute of Limitations was ever raised.

As to Docket 594, the Demurrer did not raise the question of the Statute of Limitations as to those claims arising prior to January 1, 1918 (Transcript No. 594, Page 22), so that the only question raised before the lower court was as to those claims prior to January 1, 1918, in the case against the Steamship Company.

Reliance is had on case of Kansas City Southern, plaintiff in error, vs. Wolf et al., 43 S. C. R., 259, decided February 19, 1923. This case had not been decided in this Court at the time the present cases were decided. The decision in that case in the lower court was to the contrary, as was the decision in the present cases. The Interstate Commerce Act itself does not specifically prescribe the limitation period for actions commenced by shippers before the court. The Act does, by Sections 8 and 9, give a choice of forum either before the Commission or the District Court of the United States, but the Act only specifically places a limitation upon proceedings before the Commission.

The Court in the Wolf case bases its decision entirely upon its former decision in the case of Phillips vs. Grand Trunk Western Ry. Co., 236 U. S. 662, 667, but that was a case on a claim which admittedly had to be commenced originally before the Commission. Such a case had been commenced before the Commission, not by the plaintiff in the Phillips case, but by another plaintiff on a similar claim. The Commission had established the right to recover and the plaintiff in the Phillips case commenced his action in court based upon the proceedings before the Commission, and the Court properly held that the person commencing in the Court could not have a different period of limitation than that before the Commission.

In the Wolf case this Court holds that the same principle applies. We respectfully ask for a reconsideration of this ruling. The Court in the Phillips case says that in those cases where the statute reads as does the Interstate Commerce Act, to-wit: that the proceeding shall be commenced within two years from the time the cause of action accrues and not after, the liability is destroyed. If this is the case then we submit that the same rule should apply to all questions of damages in any case which might have been submitted to the Commission, whether it may be sued upon in the state court, the United States Court, or before the Commission, and this Court has in several cases since the Phillips case permitted recoveries in cases involving interstate traffic which could have been submitted to the Commission, but were commenced in the state courts and recovery was permitted for periods considerably in excess of two years. Thus in the case of Pennsylvania Rld. Co. vs. Puritan Coal Co., 237 U. S. 121, it appears that an action for damages was commenced in the State Court of Pennsylvania for damages for discrimination in distribution of cars under tariff rules prescribed by the Railroad Company. It appeared that the cars desired were for both destinations within and without the State of Pennsylvania. (237 U. S. 124 and 127.) The action was commenced in March, 1908, and it appears on Pages 123 and 130 that claims as far back as 1902 were involved. It likewise appears that the question of the Statute of Limitations had been raised. (Page 123.)

The amendment of Section 16 of the Act to Regulate Commerce, approved June 29, 1906, reads as follows:

> "All complaints for the recovery of damages shall be filed with the Commission within two years

from the time the cause of action accrues, and not after. * * * Provided that claims accrued prior to the passage of this Act may be presented within one year."

So that if the Act is to be construed, by reason of the necessity for uniformity, so that this limitation applies to the Courts as well as the Commission, it should likewise apply as well to actions in the State Courts as those in the United States Courts, and would apply to all of the interstate claims in the Puritan Coal case, and hence, on the theory that the liability was destroyed, all of said interstate claims in the Puritan Coal case would have been barred, for they accrued prior to the amendment of June 29, 1906, and they must necessarily have been commenced within one year thereafter, but the action was not commenced, as shown by the opinion, until March, 1908, but this Court affirms the judgment in that case permitting the recovery, and this opinion was rendered subsequently to the opinion in the Phillips case.

Again in the case of Pennsylvania Rld. Co. vs. Sonman Coal Co., 242 U. S. 120, it appears that the Coal Company had brought action to recover damages from the Railroad Company for a period of four years, beginning April 1, 1903. It does not appear from the opinion just when the action was commenced, but it covered a period of four years, and if the remedy was destroyed by the Act of 1906, a part or all of these claims should not have been allowed, but the recovery allowed in the State Court was affirmed in this Court, and that in an opinion subsequent to the Phillips case. In the lower court these cases were attempted to be distinguished on the ground that they did not apply to

interstate shipments and could not apply if the damage were one coming under the interstate commerce law, but numerous cases of the same character have been brought before and considered by this Court, and are of a character which could have been brought before the Interstate Commerce Commission on the identical claims. This is plainly shown by the decision of this Court in the case of Pennsylvania Rld. Co. vs. Steinman Coal Co., 242 U. S. 300, in which this Court held that the State Court had jurisdiction, but the case was reversed on the ground that in another case the identical rule on which the case was based had been declared unreasonable by the Commission, and therefore the shipper could not bring action in court and recover on it, but the principle is clearly demonstrated that these cases are of a character which can be tried either in the State Court, the United States Court, or before the Commission. In that regard we quote the following from this Court's opinion in the Steinman Coal Company case: (Page 299)

> "The coal company was engaged in coal mining on the carrier's line in Pennsylvania and was shipping the coal to points in that and other States. Other coal companies were engaged in like operations in the same district. A rule of the carrier provided for a pro rata distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable

and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was, not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in Penn. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 131-132, where the provisions of the Interstate Commerce Act were extensively considered: 'There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts.' Adhering to this view, we think the suit was properly brought in a state court. See Penn. R. R. Co. v. Sonman Shaft Coal Co., ante, 120."

Therefore, under the contention made by counsel for the railroads, if the two year limitation applied to all cases which might come before the Commission or might be sued on in court originally, as has been ruled in the cases which are required to be brought in the first instance before the Commission, then the decisions above pointed out in the Puritan case and in the Sonman case are inconsistent with the interpretation contended for,

for if this rule is based upon the necessity for uniformity in all cases, then that limitation must apply to every case which might have been brought before the Commission even though it be brought in the State Court, but this is not the fact, because the court has permitted and does permit actions on claims more than two years old.

This contention is further confirmed by consideration of the case of Morrisdale Coal Co. vs. Penn. Railroad Co., 230 U. S. 304, in connection with the cases of Penn. Railroad Co. vs. Puritan Coal Co., 237 U. S. 121, and Penn. Railroad Co. vs. Sonman Coal Co., 242 U. S. 120. In the Morrisdale case the plaintiff was attacking not the method of distribution of cars under the car distribution rules, but was attacking the rules themselves. In each of the other cases referred to the plaintiff was attacking not the rules, but the method of distribution under the rules. In the Morrisdale case the court held that the Interstate Commerce Commission had primary, original, exclusive jurisdiction. The proceedings were commenced originally, however, in court and the request of the court was made that the case be not dismissed but held in abeyance while application could be made to the Commission for an administrative ruling, but the court denied this application on the ground that the period of limitation for proceedings before the Commission had expired and the Commission would have no jurisdiction to grant any relief on the particular shipment sued on in that case, the court saying:

"It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed, but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to Southern Ry. v. Tift, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and on it the Circuit Court made an order of restitution (206 U. S. 436). But in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 31, 1905. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, that 'all complaints for the recovery of damages shall be filed with the Commission

> within two years from the time the cause of action accrued and not after, and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; provided, that claims accrued prior to the passage of this act may be presented within one year.'
>
> "The provisions of this statute would prevent the modification asked for, and the judgment is affirmed."

From this case, taken in conjunction with the Puritan case and the Sonman case, which latter cases were proceedings directly in court without prior application to the Commission, it will be seen that the court permitted recovery for more than the two-year period prior to commencement of the actions, holding that no prior proceedings before the Commission were necessary.

In the Morrisdale case, however, the Court says that prior action by the Commission is necessary, and that the claims are barred. The practical result of these cases is therefore that the two year limitation has not in fact been applied to actions in Court, except in those cases where primary action of the Commission is necessary, but in all cases where the original jurisdiction in the Courts has been sustained, recovery for more than a period of two years has been permitted, and such recovery has been affirmed in this Court in decisions subsequently to the Phillips case in which the Court says that after the two years the liability is destroyed, and upon which case the later decision in the Wolf case has been rendered. We, therefore, submit that in the light of this practical construction which has been given this

statute, and there has been no change in the language as far as this question is concerned since the amendment of 1906, that the question should be reconsidered. The ordinary rule heretofore applied is that, where the United States statute is silent, the state statute of limitations shall govern. Is it the purpose that the state statute shall govern in those cases like the Puritan Coal Company and the Sonman Coal Company where the Court holds that the action may be commenced in the State Courts, and that the two year period shall apply only to actions in the United States Court and before the Commission? The statute is silent as to the limitation before any Court, and it is only by reason of the rule of uniformity that the period of limitation prescribed before the Commission is made to apply in any Court. If it had been the intent of the Congress to prescribe this limitation in the Courts would it not have specifically so provided, and certainly if the rule of uniformity is controlling it should apply to interstate shipments in the State Court as well as in the United States Court.

We respectfully submit that the rule should only be enforced as to those cases in which primary action must be brought before the Commission.

VIII.

THE INTERSTATE COMMERCE COMMISSION 4TH SECTION ORDER MADE IN CONNECTION WITH THE GENERAL ADVANCE IN RATES.

In the argument of these cases in the Circuit Court of Appeals there was presented a brief by Ben C. Dey as amicus curiae in which he attempted to raise the ques-

tion that the Interstate Commerce Commission had legalized all of the violations of the long and short haul clause. The order in question was made by the Interstate Commerce Commission when the general advance in rates in June, 1918, was permitted, and this order was necessary to permit the advance because of the increase in the measure of certain long and short haul violations which had been permitted by the Commission, and also because the rule adopted with reference to the disposition of fractions created some small violations which were necessary to be covered.

This question was not raised in the District Court and the Circuit Court of Appeals refused to consider it. (Tr. 594, Page 156.) But it has now been referred to in the brief of plaintiffs in error. We think our brief before the Circuit Court of Appeals covers the matter and we will embody here what was said on this subject in the Circuit Court of Appeals in view of the haste with which this brief is required to be prepared.

It is next contended that the increase in rates made by General Order 28, and the order of the Commission permitting these increases to go into effect, and permitting them to violate the long and short haul clause insofar as necessary to permit the increase to go into effect, had the effect of legalizing all violations of the long and short haul clause, irrespective of whether or not the particular violation was caused by the increase in rate or whether it had existed prior thereto and without any order of the Commission permitting the same. In other words, that this order of the Commission was a general carry-all legalization which had the effect of doing away with the prohibition of the long and short

haul clause as far as the Railroad Administration was concerned.

This question, we submit, can have no bearing in this court in these cases for the reason that it is not raised by the record. It does not appear on the face of the complaint, was therefore not raised by the demurrer to the complaint, and was not pleaded in the answer. Counsel seems to be acting on a sort of general assumption that without any pleading, this court will consider any order of the Interstate Commerce Commission on the basis that the court will take judicial knowledge of the orders and reports of the Interstate Commerce Commission. This is not the case. In order to justify their actions under any such orders of the Commission, the plaintiff in error must have pleaded the same. Having failed to plead the same, he waived any right thereunder. The question of the effect of judicial notice of the acts of the Interstate Commerce Commission was considered by the Supreme Coourt of the United States in Robinson vs. B. & O. Railroad Company, 222 U. S. p. 511, where the court says:

> "The next question to be considered is, whether judicial notice should have been taken of the decision of the Commission in Glade Coal Co. v. Baltimore & Ohio Railroad Co., wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28th, 1904, and authoritatively published in 10 I. C. C. No. 226, *but was not mentioned in the pleading or in the agreed statement of facts.* In the Supreme Court of Appeals of the

State it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in Sec. 14 of the act (25 Stat. 855), which reads: 'The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States without any further proof or authentication thereof.'

"Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute."

If counsel intended to rely upon any order of the Interstate Commerce Commission as a justification, he should have pleaded the same, and proved it. The judicial notice which the court takes is of the published records of the Commission and his proof would not have had to have been certified, but these orders of the Com-

mission do not have the force and effect of a public statute which any court may take into consideration and apply at any stage of the proceeding without being pleaded or the proof incorporated in the record. This is an appellate court, and counsel is attempting to inject certain proof in this court not offered in the lower court.

But even aside from the question that the point was not raised by the pleadings or proof, we submit that the alleged relief from the Fourth Section has not the general carry-all effect that counsel contends for it. The Federal Control Act, Sec. 10, 40 Stat. at Large, 451, provides:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress

or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any propery under such Federal control."

The only provision relieving the Railroad Administration from the regular provisions of the Interstate Commerce Act is that the Commission shall not suspend any rates or fares pending final determination.

The Railroad Administration was subject to the long and short haul clause the same as the carrier itself. It could not violate the long and short haul clause except after having first applied to the Commission and obtained its order relieving it in special cases from the operation of the long and short haul clause. There was no pretense that any such application was made permitting the Railroad Administration to charge less for hauling sugar from San Francisco to North Portland than to Portland. When the rates were increased by General Order 28, it was a general increase of 25 per cent on all rates, and where certain violations of the long and short haul clause existed before, these violations were increased by the increase in rates.

Furthermore, certain violations of the long and short haul clause were created by this order in the split of fractions in figuring the rates, and the application to the Commission was for the purpose of permitting this increased rate to go into effect and to be relieved from the Fourth Section of the Act to Regulate Commerce insofar as was necessary to permit this increase to go into effect. There were no other special circumstances before the Commission, and no other special applications

were made to the Commission, and no other special permission was granted to the carrier to violate the Fourth Section. It was permission only to the extent necessary to permit the increased rates to go into effect, and that was all that was granted by the Commission.

As the Railroad Administration was subject to the Act to Regulate Commerce as shown by Section 10 of the Federal Control Act, a general order of the Commission without evidence and finding thereon would not relieve or legalize a violation of the section theretofore in existence not authorized. The court will note the reading of the proviso of the Fourth Section:

> "Provided, that upon application to the Commission, such common carrier *may in special cases after investigation* be authorized to charge less for a longer than for a shorter distance for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

And this Court has stated in U. S. vs. Merchants Association, 242 U. S. 187, that this clause "was designated to guard against the issue by the Commission of general orders suspending the long and short haul clause, and to insure action by it separately in respect to particular carriers, and only after consideration of special circumstances existing."

The amicus curiae is seeking to have an order, which had no relation to this particular violation of the long and short haul clause but which did have relation to a general advance in rates, considered as a carry-all and

general order to legalize all violations of the long and short haul clause, which is contrary to the interpretation placed thereon by the Supreme Court. Counsel seems to take solace in the fact that in the case just cited, there were a great many carriers involved, but the characters of the violations which were under consideration were all of a particular kind, evidence had been offered before the Commission as to what they were, and the order of the Commission, after considering the circumstances, laid down the basis on which, and the extent, to which, those carriers could charge more for the long than for the short haul. It was a special case, specially and thoroughly investigated, and a particular order entered therein. But amicus curiae is seeking to have an order having no relation to this particular violation on which no evidence with reference to this violation was offered construed into legalizing and authorizing this particular violation. It can't be done.

IX.

MEASURE OF DAMAGES

The carriers are contending that the difference between the rate to North Portland and to Portland is not the measure of damages but we submit that under the law the North Portland rate is the only rate which can be applied, as the higher rate to Portland did not exist, as pointed out under the decision of Mr. Chief Justice Brewer in the case of United States vs. Louisville & Nashville, 235 U. S. 314, and hence any sum in excess of said North Portland rate was illegally exacted.

The Circuit Court of Appeals for the 9th Circuit has applied this rule in California Adjustment Co. vs. S. P., 237 Fed., 954, and the Supreme Court of Cali-

fornia has likewise adopted this as the measure of damages in California Adjustment Co. vs. A. T. & S. F., 185 Pac., 282.

The language of the Supreme Court of Kentucky in the case of Louisville & Nashville vs. Walker, 110 Ky. 961, 63 S. W. 20, cited in S. P. Co. vs. Cal. Adjustment Co., 237 Fed. 960, is very pertinent, to-wit:

> "As one means of protecting the legal shipper this section fixed a maximum limit beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is just as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum as the limit of charge. The carrier is allowed by the constitution to fix a rate for the longer haul, but when he so fixes it, this rate is the limit beyond which he cannot go in charging for the same service in the shorter haul, and when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to

charge. To illustrate, if it had been provided by statute that appellant should charge no more for hauling tobacco than it charged for hauling other like freight, and appellant while it charged 20 cents per hundred for hauling like freight had charged appellee 29 cents per hundred for hauling his tobacco, it would be clear that 9 cents per hundred had been taken from appellee in violation of law, and it would be no defense for appellant to say that appellee was being prejudiced by its giving lower rates to other freight and it did not hurt him in any way that other people were charged less than they ought to have been charged, for in such a case the excessive charge for carrying tobacco would be illegal."

It is true that the Interstate Commerce Commission in the cases pointed out by the brief of plaintiffs in error, has refused to follow this rule, basing their decision upon the decision of this Court in Pa. R. R. Co. vs. International Coal Co., 230 U. S., 184. That case, however, was not one for recovery of damages which were specifically provided by statute, but was an action for damage by one person who had been receiving a rebate on account of the fact that another shipper had received a greater rebate than he, and it was attempted to be claimed that his measure of damages was the difference in the two rebates but the Court held as neither person was claiming under a legal rate he could only recover such damages as he could prove by reason of the fact that the other shipper had received a greater rebate. That, we submit, is not proper authority to refuse to grant the difference in the rate charged over that which the stat-

ute says shall not be exceeded. The measure of damages is prescribed by the statute. In the present case the carriers have taken a certain amount more than the statute says they could take. The measure of damages is certainly the difference between this amount and the amount which they did charge.

The distinguishing feature of the International Coal case is pointed out by the Circuit Court of Appeals of the 9th Circuit in California Adjustment Co. vs. S. P., 237 Fed., 965, and in the later case in this Court of Southern Pacific Company vs. Darnell Taenzer, 245 U. S., 534, this Court likewise distinguishes the International Coal case in the following language:

> "The cases like Pennsylvania Railroad Co. vs. International Coal Mining Co., 230 U. S., 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss."

So in the present case the plaintiffs' assignors have paid out of pocket an amount which the statute said should not be exacted of them and their damages are definitely fixed by the statute.

X.

ATTORNEY'S FEES IN THIS COURT

If the judgment of the lower court is sustained, we respectfully submit that this Court should assess as part of the costs, attorney's fees in this Court. Section 8 of the Act provides for the assessment of a reasonable counsel's or attorney's fee to be fixed by the court in every case of recovery, which fees shall be taxed and collected as part of the costs in the case. The District Court limited the attorney's fees to the fees in that court. The Circuit Court made an additional allowance for fees in that court and we suggest that similar allowance be made in this Court. This seems to be the practice outlined in Mills vs. Lehigh Valley, 226 Fed., 812, and N. Y. N. H. & H. vs. Ballou & Wright, 242 Fed., 862.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed with the addition of attorney's fees in this Court.

Respectfully submitted,

JAMES G. WILSON,

Attorney for Defendants in Error.

N. B.—The foregoing brief has been very hastily prepared. Our information was that these cases would be reached about the last of November. At noon Thursday, October 11th, we were advised the case would likely be heard October 18th or 19th. We necessarily had to have this brief complete in the printer's hands by noon of the 12th. We offer this by way of explanation of any errors or lack of full discussion.

No. 122

FILED
SEP 20
WM. R. STA

In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a corporation,
Plaintiff in Error
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. [redacted]123

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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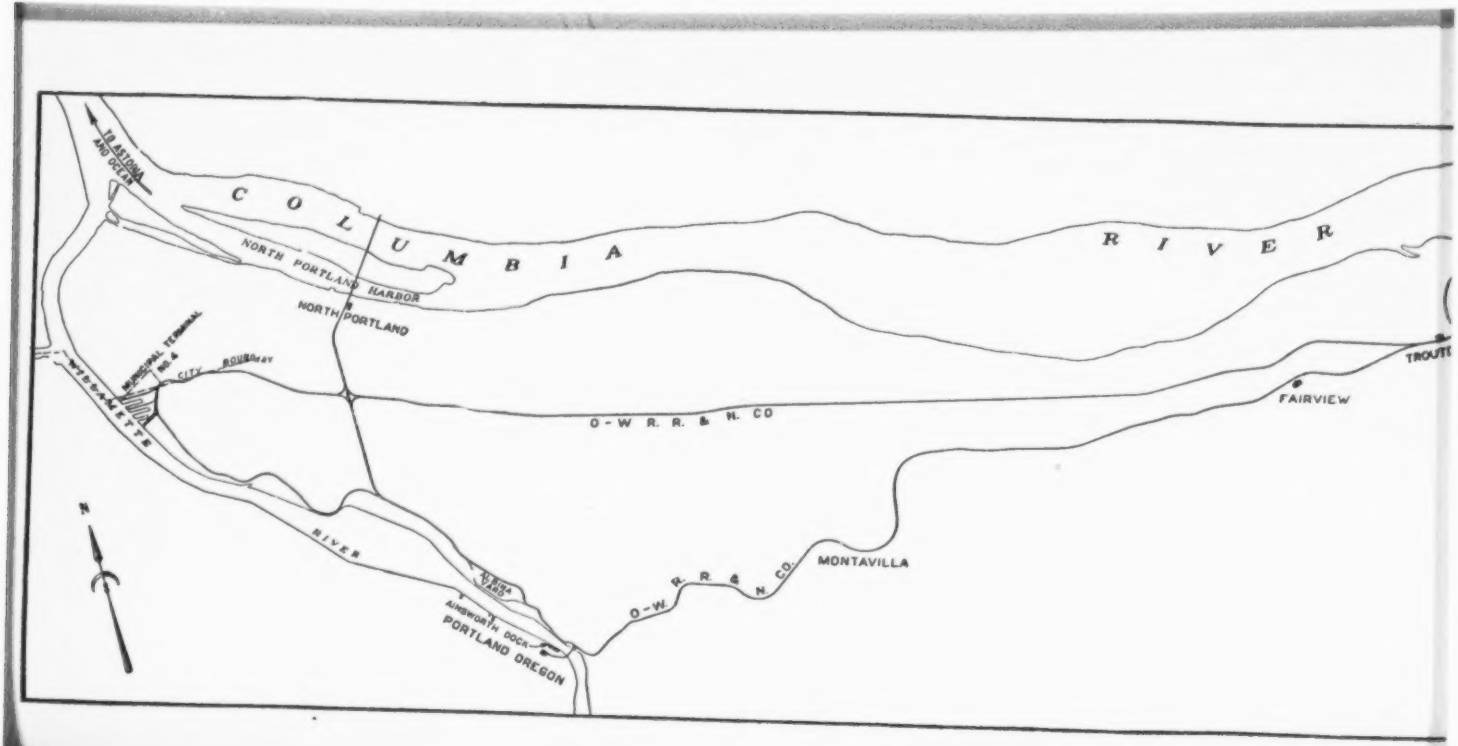
TO ASTORIA AND OCEAN
COLUMBIA RIVER
NORTH PORTLAND HARBOR
NORTH PORTLAND
MUNICIPAL TERMINAL NO. 4
CITY
BOULEVARD
WILLAMETTE
RIVER
O-W R. R. & N. CO
FAIRVIEW
TROUTT
O-W. R. R. & N. CO.
MONTAVILLA
ALBINA YARDS
AINSWORTH DOCK
PORTLAND OREGON
N

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In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a corporation,
Plaintiff in Error
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 573

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF CASE

These two actions were tried together in the District Court of the United States for the District of Oregon, consolidated for hearing in the Circuit Court of Appeals, and application will be made for consoli-

dation in this Court. The same questions are involved in both actions, and therefore it seems appropriate that they be briefed jointly.

Both actions were brought in the District Court of the United States for Oregon by Defendant in Error, whom we shall hereafter refer to as "the plaintiff", on claims assigned to him by various shippers. No prior application was made to the Interstate Commerce Commission for relief. The actions involve alleged violations of the long and short haul clause (Section 4) of the Act to Regulate Commerce, in respect of shipments wholly by water from San Francisco, California, to Portland and Astoria, Oregon, before, during and after Federal control of railroads.

The water carrier involved is The San Francisco and Portland Steamship Company, which for brevity we shall hereafter call "The Steamship Company". Its stock is owned by Oregon-Washington Railroad & Navigation Company, an interstate rail carrier. Therefore, under the terms of the Act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone", (37 Stat. L. 566), if the Steamship Company did or might compete with the Railroad Company, it was necessary for the rail carrier to secure permission from the Interstate Commerce Commission to continue ownership and operation of the Steamship Company after July 1, 1914. Such an application was made and granted, and, it is contended, thereby the Steamship Company submitted to the requirements of the Panama Canal Act, that "the rates, schedules and practices of

such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier."

The period involved begins May 10, 1916, and ends April 30, 1921. During that period the Steamship Company's vessels were under corporate control from May 10, 1916, to October 15, 1917. On the latter date all the Steamship Company's vessels were requisitioned by the United States Shipping Board and the Steamship Company directed to continue to operate them "for account of the Government". A charter of the vessels to the Shipping Board was later executed as of that date. On May 24, 1918, the Shipping Board gave to the Steamship Company "five days' notice of the cancellation of the requisition charter", and "that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels". On May 30, 1918, the Director General of Railroads assumed control over the Steamship Company and its vessels and continued in control until March 1, 1920, the date of termination of Federal control of railroads.

The gravamen of plaintiff's suits is that the Steamship Company and Oregon-Washington Railroad & Navigation Company (and during Federal control the Director General) had on file with the Interstate Commerce Commission certain joint water and rail tariffs naming rates on sugar from San Francisco to North Portland, Oregon, which were lower than the rates charged plaintiff's assignors on similar shipments from San Francisco to Portland and Astoria. The com-

plaints assert that Portland and Astoria are intermediate to North Portland and that therefore the long and short haul clause of the Commerce Act (Section 4) was violated. The defendants admit that Astoria is an intermediate point between San Francisco and North Portland, but deny that Portland is intermediate.

The particulars of the claims are as follows: Prior to May 10, 1916, a rate of 12½c per hundred pounds on sugar from San Francisco to Portland and Astoria was carried in the Steamship Company's local tariff and a similar rate was named on sugar from San Francisco to North Portland in a joint water and rail tariff promulgated by Oregon-Washington Railroad & Navigation Company and the Steamship Company. On May 10, 1916, the rates to Portland and Astoria named in the Steamship Company's local tariff were increased to 15c. Through oversight, or for some other reason not disclosed, no corresponding increase was made in the rates to North Portland named in the joint water and rail tariff. On June 25, 1918, the Director General of Railroads by his General Order No. 28 increased the rates of all carriers throughout the United States by twenty-five per cent. The rate to Portland and Astoria carried in the Steamship Company's local tariff was thus increased to 19c and the rate to North Portland named in the joint water and rail tariff to 15½c. No changes were made in these rates until August 26, 1920, (after Federal control), when the Commission granted a second general increase of twenty-five per cent. to all carriers in the Pacific territory. The rates to Portland and Astoria were correspondingly increased to 24c and the rate to North Portland to 19½c and these

rates were not again changed up to the time the complaints were filed.

An inspection of the map attached to the fly leaf of this brief is necessary to an understanding of the location of Portland and North Portland. Portland is located on the Willamette River, about twelve miles above its confluence with the Columbia River. North Portland is located on Oregon Slough, a navigable arm of the Columbia River, and is about four miles above the confluence of the Willamette and Columbia. To reach Portland, vessels must pass the mouth of Oregon Slough, thus passing the docks at North Portland at a distance of about four miles. It is also necessary for such vessels to pass Municipal Terminal No. 4, from which shipments to North Portland may be transported by rail over the lines of the Oregon-Washington Railroad & Navigation Company. The customary route for the Steamship Company's vessels is to land at Ainsworth Dock, in the heart of the City of Portland, but this is a matter of Company convenience and there is no physical obstacle which would prevent the vessels from landing first at North Portland or at Municipal Terminal No. 4.

Plaintiff's assignors are wholesale grocers and sugar merchants who transport sugar in large quantities to Portland and there sell to the retail trade. They have no competitors at North Portland, there being at that point only one user of sugar—a meat packing plant which uses a limited amount of sugar in its packing process. The evidence discloses no shipments of sugar from San Francisco to North Portland and the rates named in the joint water and rail tariffs were merely

paper rates. Presumably the meat packing plant at North Portland purchases its sugar from plaintiff's assignors.

The assignments under which plaintiff claims are in ordinary form and do not attempt to comply with the provisions of Section 6383, U. S. Compiled Statutes of 1916, relating to assignments of claims against the United States. Neither plaintiff nor his assignors applied to the Interstate Commerce Commission for any form of relief, but on February 12, 1921, plaintiff began his two suits in the District Court of the United States for the District of Oregon. His complaints recite the history of the rates to Portland, Astoria and North Portland, as heretofore set out; allege that the Portland and Astoria rates violated Section 4 of the Act to Regulate Commerce, and pray judgment for the difference between the Portland and Astoria rates and those to North Portland. The theory of the suits is money had and received. The complaints do not allege that the Portland and Astoria rates were unreasonable nor that plaintiff's assignors were damaged in any way except that they paid the tariff rates to Portland and Astoria, which were higher than the rates to North Portland. No evidence of unreasonableness of any of the rates was offered nor any evidence of damage other than the payment of the rates.

Demurrers were interposed by defendants, challenging the jurisdiction of the District Court and, in the Steamship Company's case, challenging the sufficiency of the complaint and setting up that action on those claims arising prior to January 1, 1918, was not commenced within the time limited by the Act to Regu-

late Commerce and the laws of the State of Oregon. These demurrers were overruled and the defendants answered. The Steamship Company denied it was in control of its vessels between October 12, 1917, (this should have been October 15, 1917, the date the Shipping Board requisitioned the vessels) and the termination fo Federal control, or that it collected any sums from plaintiff's assignors during that period. The Director General denied that he operated the vessels prior to May 30, 1918, (the day after the Shipping Board requisition charter was cancelled) or that he collected any charges from plaintiff's assignors prior to that date. The Steamship Company also set up the bar of the two-year limitation in the Act to Regulate Commerce against claims on shipments moving and charges paid prior to Federal control, and further pleaded that the charges collected after Federal control and before August 26, 1920, were in accordance with the rates shown in the Director General's tariffs at the termination of Federal control, and that the rates collected from and after August 26th were on the basis of the Director General's rates plus the twenty-five per cent. increase ordered by the Interstate Commerce Commission, effective on that date.

Judgments were returned in favor of the plaintiff as follows:

Against the Steamship Company for $11,380.69, of which $2648.64 was on shipments moving prior to January 1, 1918, and included shipments moving during the time the vessels were operated under the Shipping Board charter, and $8732.05 on shipments moving after Federal control. Interest was allowed and $2000.00 as

attorney's fees. The attorney's fees were later increased by $1000.00 in the Circuit Court of Appeals.

Against the Director General for $7339.06, on shipments moving between January 1, 1918, and March 1, 1920, the period of Federal control of railroads, and including shipments moving between January 1, 1918, and May 29, 1918, the date of termination of the Shipping Board requisition charter. Interest was also allowed, and $1500.00 as attorney's fees, which latter sum was increased by $600.00 in the Circuit Court of Appeals.

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgments and allowed further attorney's fees in the sums stated (281 Fed. 10). The cases are brought to this Court on writ of error.

POINTS AND AUTHORITIES

I.

Under the terms of Section 15 of the Interstate Commerce Act, as amended in 1910 and 1920, transportation wholly by water is not subject to the Act, notwithstanding the provisions of the Panama Canal Act.

Section 15, Interstate Commerce Act, 36 Stat. L. 552.

Transportation Act of 1920, Sec. 408, 412, 413, 418; 41 Stat. L. 482, 483, 485.

Fed. Stat. Ann. 1920 Sup. pages 104, 105, 106.

Panama Canal Act, 37 Stat. L. 560, 566.

Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 160, 164.

Lewis' Sutherland Statutory Construction, 2nd Ed. Vol. 2, page 667.

II.

Assignments of claims against the Director General not complying with Section 3477, Revised Statutes, are void.

Section 3477, Revised Statutes.

Spoffard vs. Kirk, 97 U. S. 484.

National Bank vs. Downie, 218 U. S. 345.

Mo. Pacific R. Co. vs. Ault, 256 U. S. 554.

Seaboard Air Line vs. U. S. 256 U. S. 655.

III.

No liability can attach either to the Steamship Company or the Director General on shipments moving during the time the Steamship Company's vessels were being operated by the Shipping Board.

Mo. Pacific R. Co. vs. Ault, 256 U. S. 554.
Davis, Director General, vs. Zirkle, 138 N. E. 266.

IV.

The District Court was without jurisdiction, exclusive original jurisdiction being lodged in the Interstate Commerce Commission.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.

Robinson vs. Baltimore & Ohio R. Co., 222 U. S. 506.

Mitchell Coal & Coke Co. vs. Pennsylvania R. Co., 230 U. S. 247.

Morrisdale Coal Co. vs. Pennsylvania R. Co., 230 U. S. 304.

Texas & Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138.

Northern Pacific Ry. vs. Solum, 247 U. S. 477.

Director General vs. Viscose Co., 254 U. S. 498.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Pennsylvania R. Co. vs. Puritan Coal Co., 237 U. S. 121.

Pennsylvania R. Co. vs. Sonman Coal Co., 242 U. S. 120.

St. Louis etc. R. R. Co. vs. Hasty, 255 U. S. 252.

V.

Section 4 of the Interstate Commerce Act, (the long and short haul clause), is a statute relating to a form of discrimination and not one merely declaring the intermediate rate unlawful.

Parsons vs. C. & N. W. Ry. 167 U. S. 447.

Fourth Section, Interstate Commerce Act.

VI.

Discrimination may be removed either by raising one rate, lowering the other, or changing both, and the fact that a rate discriminates against one locality in favor of another one does not in itself entitle the first locality to the same rate as the tariff provides for the second.

American Express Co. vs. Caldwell, 244 U. S. 617.

St. Louis etc. Ry. Co. vs. U. S. 245 U. S. 144.

Hillsborough Mills vs. Boston & Maine R., 269 Fed. 816.

VII.

Section 6 of the Interstate Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. In view of this section the carriers were compelled to collect their published rates or refuse to accept the commodities for shipment.

Section 6, Interstate Commerce Act.

Section 4, Interstate Commerce Act.

VIII.

Under Section 6 the carriers must collect their published rates, even though they are violative of other sections of the Act.

Armour Packing Co. vs. U. S. 209 U. S. 56.

P. C. C. & St. L. vs. Fink, 250 U. S. 577.

Keogh vs. C. & O. R. R. Co., 43 Supreme Court Reporter, 47.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Poor Grain Co. vs. C. B. & Q. R. Co., 12 I. C. C. 418.

Interstate Remedy Co. vs. American Express Co., 16 I. C. C. 436.

Crescent Coal & Mining Co. vs. C. & E. I. R. Co. 24 I. C. C. 149.

IX.

Under plaintiff's theory that the rates to Portland were not legally published rates, there were no legally published rates at all—the transportation must therefore have been unlawful, and the courts will not aid shippers in collecting any part of the charges which they paid.

Payne vs. Bassett, 235 S. W. 917.

X.

The mere fact that a rate is violative of the long and short haul clause of the Interstate Commerce Act

does not entitle shippers to an intermediate point to recover the excess over the rate to the more distant point.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.
International Coal Co. vs. Pennsylvania R. Co., 230 U. S. 184.
Iten Biscuit Co. vs. C. B. & Q. R. Co., 53 I.C.C. 729.
Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

XI.

The long line of decisions of the Interstate Commorce Commission in Fourth Section violation cases holding that mere proof of the difference in the rates is no evidence of damage, should be followed by this court, because not manifestly incorrect.

Heath vs. Wallace, 138 U. S. 573.
U. S. vs. Cerecedo, 209 U. S. 337.

XII.

Section 10 of the Federal Control Act, and the Transportation Act of 1920, lodged exclusive original jurisdiction of cases against the Director General involving violations of the Interstate Commerce Act in the Interstate Commerce Commission.

Section 10, Federal Control Act, 40 Stat. L. 451.
Northern Pacific R. Co. vs. North Dakota, 250 U. S. 135.

Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6.

Transportation Act of 1920, Section 206 (c) 41 Stat. L. 462.

25 R. C. L. 1010.

Phillips vs. Grand Trunk Ry., 236 U. S. 662.

Kansas City Sou. R. Co., vs. Wolf, 43 Supreme Court Reporter, 259.

Mo. Pac. R. Co. vs. Ault, 256 U. S. 554.

XIII.

No violation of the Fourth Section was proved, because the evidence showed that there was no transportation to the more distant point, the rate being merely a paper rate.

Section 4, Interstate Commerce Act.

Parsons vs. C. & N. W. Ry., 167 U. S. 447.

Judson on Interstate Commerce, 3rd Ed. page 529.

Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

Anaconda Copper Mining Co. vs. Director General, 64, I.C.C. 136.

Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487.

XIV.

There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates and the paper rates to North Portland were joint rates.

Chi. & N. W. R. Co. vs. Osborne, 52 Fed. 912.

U. S. vs. Mellen, 53 Fed. 229.

I. C. C. vs. C. etc. R. Co, 56 Fed 925-162, U. S. 184.

Allen & Lewis vs. O. R. & N. Co., 98 Fed. 16.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.

XV.

During Federal control rates were initiated and maintained under order of the President, and the Fourth Section of the Commerce Act was therefore inapplicable to them.

Section 10, Federal Control Act, 40 Stat. L. 451.

Northern Pacific Ry. vs. North Dakota, 250 U. S. 135.

Missouri Pacific R. Co. vs. Ault, 256 U. S. 554.

Alabama, etc. R. Co. vs. Journey, 42 S. C. R. 6.

XVI.

If there was a departure from the Fourth Section it was covered by appropriate orders of the Commission.

Interstate Commerce Commission, Fourth Section Orders 7316 and 7601.

XVII.

The carriers were required during the first six months after Federal control to collect the rates which

they found in the Director General's tariffs, whether they conformed to the Fourth Section or not.

Transportation Act, Section 208 (a), 41 Stat. L. 464.

Wasatch Coal Co. vs. Baldwin, 208 Pac. Utah, 1109.

Public Service Commission vs. New York Central, 185 New York Supplement, 268.

XVIII.

The measure of damages in Fourth Section cases is not the difference between rates.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.

Pennsylvania R. Co., vs. International Coal Co., 230 U. S. 184.

Hillsborough Mills Co. vs. Boston & Maine R. Co., 269; Fed. 816.

Homestead Coal Co. vs. Des Moines Elec. Co., 226 Fed. 49.

Atchison etc. R. Co. vs. Spiller, 246 Fed. 1, 20.

Clark Bros. Coal Mining Co. vs. Pennsylvania R. Co., 238 Fed. 642.

Lehigh Valley R. Co., vs. American Hay Co., 219 Fed. 539.

XIX.

All claims antedating February 12, 1919, are barred because not brought within two years.

Section 16 Interstate Commerce Act.

Phillips vs. Grand Trunk Ry. Co., 236 U. S. 662.

Kansas City South R. Co. vs. Wolf, 43 S. C. R. 259.

Transportation Act, Section 206 (f) 41 Stat. L. 462.

Eberhart vs. U. S. 204 Fed. 884.

ARGUMENT.

DOES COMMERCE ACT APPLY TO SHIPMENTS WHOLLY BY WATER?

As the transportation involved in these cases was wholly by water, the question at once arises whether Section 4 of the Commerce Act applied to it.

Section 15 of that Act was amended in 1910 (36 Stat. L. 552) so as to read in part as follows "nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." The Transportation Act of 1920 re-enacted this provision and added the words "or practice or" after the word "classification."

The theory of the complaints is that Section 4 of the Commerce Act applies to all the Steamship Company's transportation because the railroad owner of the Steamship secured permission under the Panama Canal Act to continue such ownership. If this theory is unfounded, there is no basis for these suits.

The first paragraph of Section 11 of the Panama Canal Act of August 24, 1912 (37 Stat. L. p. 560, 566) amended Section 5 of the Commerce Act by adding a clause forbidding railroads after July 1, 1914, to own or control water carriers which "do or may compete with such railroads." Then follow two paragraphs which were not declared to amend the Commerce Act. They provide that the Interstate Commerce Commission shall determine whether competition does or may exist and,

if it believes the public interest requires it, may "extend the time during which such service by water may continue to be operated beyond July 1, 1914," and further that "In every case of such extension the rates, schedules and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation."

On February 28, 1920, after the greater part of the shipments had moved and charges on them had been paid, the Transportation Act (41 Stat. L. 456, 482) amended the Commerce Act by adding the two paragraphs of the Panama Canal Act just mentioned to Section 5. The same Act re-enacted Section 15 of the Commerce Act with the addition which we have quoted.

These two statutes seem, on casual inspection, to be in conflict. If the Panama Canal Act is construed as intended to apply all of the terms of the Commerce Act to transportation wholly by water, the conflict is real, and one of the statutes must fall before the other. If such a conclusion is reached it can not be said that the provisions in the Panama Canal Act are the later expressions of Legislative will, since they were first added to the Commerce Act in 1920, which at the same time re-enacted Section 15.

If the Panama Canal Act makes Section 4 of the Commerce Act applicable to transportation wholly by water, it likewise makes the other sections of the Commerce Act applicable, including Section 15. Such transportation is therefore, under that view, made subject

to the Act by one section of the statute and not subject to the Act by another, an impossible situation.

The language of the two sections does not, however, require such a conclusion and a construction harmonizing the sections is entirely possible. The Panama Canal Act subjects the rates, schedules and practices of the water carrier to the Commerce Act only "in the same manner and to the same extent *as is the railroad* * * * controlling such water carrier"—not as are the rates, schedules and practices of the railroad, but *"as is the railroad."* Railroads are ordinarily subject to the Commerce Act, as to part of their business, and not subject as to part. A part of a railroad's business may be transportation wholly by water. As to such transportation it is not subject to the Commerce Act. It may also be engaged in transportation partly by water and partly by rail, under an arrangement for a continuous carriage. As to such transportation it is subject to the Act. It may likewise be engaged in transportation partly by rail and partly by water, with no arrangement for a continuous carriage. In that event it is subject to the Commerce Act on the part of the transportation that is by rail, assuming it to be interstate, but not on the part that is by water. (Section 1, Commerce Act). A water carrier owned by a railroad may also be engaged in transporting commodities destined to move by rail from the water carrier's terminal over the lines of some railroad other than that of its owner without any arrangement for a continuous carriage. Nevertheless, as to such transportation, the water carrier would not be subject to the Act, whereas a railroad transporting commodities wholly within one state, as the first step in an interstate journey, would be subject to the Act with or without an arrangement for a continuous car-

riage. Under any view, a railroad may operate a boat line which does not and cannot compete with it, and as to transportation wholly by water by such boat line the railroad is not subject to the Act.

There are then various situations in which a water carrier engaged in transportation of commodities moving partly by rail from the water carrier's terminal is not subject to the Act, whereas, under similar circumstances, a rail carrier would be subject. Is it not then a reasonable conclusion that the Panama Canal Act was intended to apply the Commerce Act only to shipments partly by water and partly by rail, where for one reason or another the Commerce Act did not already apply? Viewed in this light, there is no conflict between the two acts.

This interpretation of the Panama Canal Act harmonizes with the whole scheme of the Commerce Act and is closely paralleled by the provisions of Section 6 Paragraph (13) as amended by the Transportation Act of 1920 (41 Stat .L. 483). Those paragraphs confer on the Commission jurisdiction over joint rail and water movements between points in the United States through the Canal or otherwise. They do not, however, give such jurisdiction over transportation wholly by water and it is difficult to conceive a reason for a different policy relating to railroad owned vessels.

If it be held that the Panama Canal Act subjects railroad owned water carriers to the Commerce Act as to all their interstate transportation, whether wholly by water, or otherwise, to the same extent as the railroad owners, absurb results follows. Liability for loss and damage to shipments must then be determined by the rule applied by Section 20 to railroads and not by

the laws applicable to transportation by water, and this notwithstanding Section 15. Railroads are required to furnish adequate facilities, including cars. So, under this view, it would follow that, if more business is offered than a water carrier can handle, it must purchase or charter additional vessels. Railroads are required to secure certificates of convenience and necessity before constructing new lines or abandoning old ones. It would follow that water carriers must secure similar certificates before adding to their ports of call, or eliminating ports of call, or going out of business. Other provisions of the Commerce Act are equally inapplicable to transportation by water.

If Section 20 of the Commerce Act applies to railroad owned water carriers, and liability for loss and damage to their shipments is governed by the Cummins' Amendment, then there are two widely different rules of liability, one applicable to shipments transported by railroad owned water carriers, and the other applicable to shipments transported by other water carriers. But this would have the effect of destroying the uniformity of maritime law throughout the United States, which this Court has held the Constitution established. Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 160, 164.

If Section 15 of the Commerce Act and Section 11 of the Panama Canal Act are construed as in conflict, one of two results must follow. They both are void as neutralizing each other, or the one which is the latest expression of the legislative will must be deemed to repeal the other. Of course, until the paragraph extending the Commerce Act to the rates, schedules and practices of water carriers was made a part of Section 5 of the Commrce Act by the Transportation Act of 1920,

Section 15 remained in full effect. After the Transportation Act, the effect of the conflict between the two sections must be determined by the following rule laid down in Lewis' Sutherland Statutory Construction, 2nd Edition, Volume 2, page 667:

> "Where one part of an act is in conflict with another, and they cannot be brought into harmony by any rule of construction; where they are of equal scope, and there is a point-blank repugnancy so that if one operates at all it will necessarily antagonize any effect of the other, what is the consequence? Both are void, by one neutralizing the other, on the ground that the legislature uno flatu have enacted a contradiction; or one, for being earlier or later in position, must be deemed to render the other nugatory, or repeal it. The decisions are to the effect that the provision which is latest in position repeals the other."

THE ASSIGNMENTS OF CLAIMS AGAINST THE DIRECTOR GENERAL ARE VOID.

All of the claims involved in the suit against the Director General are held by plaintiff under assignments from various shippers. These assignments were, of course, purely voluntary and in no sense by operation of law, and therefore fall within the purview of Section 3477 of the Revised Statutes which reads in part as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

In Spoffard vs. Kirk, 97 U. S. 484, this statute was thus interpreted by this court at page 490:

"However, that may be, the language of the Act is too sweeping and positive to justify us in giving it a limited construction. We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and, all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, and that they are valid and effective as between the parties thereto, and only invalid when set up against the Government.

It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was, therefore, rightly dismissed."

And again at page 488:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."

In National Bank vs. R. E. Downie, 218 U. S. 345, this court further emphasized the finality of the prohibition against assignments in the following language at page 356:

> "If any regard whatever is to be had to the intention of Congress, as manifested by its words —too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred."

In Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, it was held that the Director General of Railroads was the agency of the government for operation of the railroads and an arm of the government, and that "by these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined." (563.)

It is true that this court in Seaboard Air Line vs. U. S., 256 U. S. 655, held to be without the purview of the statute the transfer of all of the property of a Railroad Company to another Railroad Company pursuant to the statutes of two states providing that all of the first railroad's property should be transferred to the second. But that was an assignment by operation of law, whereas here we have a purely voluntary assignment.

In Parrington vs. Davis, 285 Federal 741, the District Court of the United States for Oregon held the statute inapplicable on the authority of Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, but as we read the Ault case it does not deal with the question.

There is no doubt that the claims are against the United States, that the assignments were voluntary, and that there is no specific provision of any statute

authorizing such assignments. The evil at which the statute was directed is present in as great measure in respect to these claims as in respect of other claims against the United States.

It is, of course, no answer to say that the invalidity of the assignments is not pleaded by the defendants because the statute makes such assignments void and the complaints setting out the fact of the assignments therefore did not state a cause of action, and the evidence showing the assignments disclosed that they were void. The question may therefore be raised at any time.

NEITHER DIRECTOR GENERAL NOR STEAMSHIP COMPANY LIABLE ON SHIPMENTS HANDLED BY SHIPPING BOARD.

The answers allege and the evidence discloses that the Shipping Board requisitioned all the Steamship Company's vessels effective October 15, 1917, and operated them from that date to May 29, 1918, both dates inclusive. It is true that the Shipping Board operated through the former officers and employes of the Steamship Company, as did the Director General when he took control of the Steamship Company's vessels on May 30, 1918. It is true, likewise, that the bill of lading forms used were the Steamship Company's forms. In this respect the situation was the same as in the case of operation of all of the railroads during the first few months of federal control. That these facts are not sufficient to charge the corporation with liability is taught by Davis, Director General vs. Zirkle, 138 N. E. (Ind.) 266, decided March 7, 1923.

The vessels were requisitioned under authority of law and the Steamship Company directed to continue to operate them for account of the Government. Therefore, under the authority of Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, the Steamship Company is not liable on shipments moving between October 15, 1917, and January 1, 1918, the beginning of federal control, nor is the Director General liable on shipments moving between January 1, 1918, and May 30, 1918.

THE DISTRICT COURT HAD NO JURISDICTION. EXCLUSIVE ORIGINAL JURISDICTION OF THIS CLASS OF CASES WAS LODGED IN THE INTERSTATE COMMERCE COMMISSION BY THE COMMERCE ACT, AND AS TO CLAIMS AGAINST THE DIRECTOR GENERAL BY THE FEDERAL CONTROL ACT AND THE TRANSPORTATION ACT.

The extent of the exclusive original jurisdiction of the Interstate Commerce Commission has been before this court in numerous cases. Before Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, the courts seemed to have entertained all classes of cases involving violations of the Commerce Act. In that case, however, it was pointed out that exclusive initial jurisdiction was lodged in the Interstate Commerce Commission in all cases where a scheduled rate is attacked, and that when a rate is once established in a tariff carriers are bound by law to collect it until changed by the Commission.

In Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, it was held that the method or rule of distribution of cars adopted by a carrier can only be attacked before the Commission and that the courts are without jurisdiction of such cases.

In Robinson vs. Baltimore & Ohio R. R. Co., 222 U. S. 506, a rate was attacked as discriminatory. It was held that the courts were without jurisdiction since this involved an attack upon a scheduled rate.

In Mitchell Coal & Coke Co. vs. Pennsylvania R. R. Co., 230 U. S. 247, jurisdiction was denied to the courts of a suit for damages by reason of the payment by a carrier of unreasonable amounts for service performed by some shippers, while refusing to make similar payments to others.

In Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304, the courts were again denied jurisdiction of suits for damages based on allegations that the rule of car distribution adopted by a carrier was discriminatory.

In Texas and Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138, jurisdiction was denied the courts of a suit to determine whether rates in a lumber tariff applied to cross ties.

In Northern Pacific Ry Co. vs. Solum, 247 U. S. 477, jurisdiction was denied the courts of a suit for damages against a carrier for routing shipments, in the absence of direction by the shippers, over the more expensive of two possible routes. The following succinct statement of the rule requiring preliminary determination of administrative questions by the Commission was made in that case:

> "It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

In Director General of Railroads vs. Viscose Co., 254 U. S. 498, jurisdiction was denied to the courts of a suit enjoining the Director General from cancelling a tariff on raw silk and adding that commodity to the articles "that will not be accepted for shipment". The concluding sentence of the opinion is illuminating:

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (citing numerous decisions), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative."

On the other hand, in Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, jurisdiction of the courts was sustained in a suit for damages based on a carrier's giving rebates from the scheduled rates to a shipper's competitor; in Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S. 121, and Pennsylvania R. R. Co. vs. Sonman Coal Co., 242 U. S. 120, it was held the courts had jurisdiction of suits for damages on account of failure to furnish cars, there being no shortage of cars involved and no attack being made upon the rule of distribution adopted by the carrier; in St. Louis, etc., R. R. Co. vs. Hasty, 255 U. S. 252, this court interpreted a tariff where the matter was so free from doubt that it considered there was no occasion to apply to the Commission for a construction.

The distinction between the two classes of cases is obvious. In the one, scheduled rates or rules adopted by the carrier are attacked on one ground or another; in the other, no attack is made upon the schedules or rules of the carrier, but some departure from them or some matter unconnected with the schedules or rules is involved. In the one the uniformity sought by the Commerce Act necessitates a finding by a competent tribunal for the benefit of all shippers similarly situ-

ated and binding upon them; in the other there is involved merely a controversy which concerns only a carrier and a particular shipper, and the finding of a court does not bind or directly benefit other shippers; in the one examination of the schedules and rules of the carrier by a specially equipped tribunal is necessary to full relief, and in the other the schedules and rules of the carrier are, for the purposes of the litigation, conclusively presumed legal.

Plaintiff recognizes these principles, but asserts that he is not attacking a legally published rate; that a rate to an intermediate point higher than to a more distant point, even though actually published in a tariff, is never legally published. He assumes that the other rates named in the tariff are legally published rates and that the rate to the more distant point automatically becomes the rate to the intermediate point.

But this is in direct contradiction to the provision of Section 4 that the prohibition against charging more for the short haul than the long "shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance".

Section 6 (Paragraph 7) of the Commerce Act is as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge

or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It follows that if the rate to an intermediate point is not the legally published rate there is no legally published rate and the carrier cannot legally transport the commodity, nor the shipper permit it to be transported to the intermediate point. It is no answer to say that the rate to the intermediate point provided by the tariff previously in effect would govern, since the carriers have cancelled that tariff. In addition, the higher rate to the intermediate point might arise from a reduction of the rate to the more distant point, in which case, under plaintiff's theory, the intermediate rate would immediately become illegal and there could be no published rate. Under plaintiff's theory, therefore, the sugar shipped by his assignors was shipped illegally because there were no rates published to cover the movement.

In this situation, the doctrine of Payne vs. Bassett, 235 S. W. 917, that there can be no recovery for damage to commodities transported in interstate commerce when there is no legal published rate to cover the movement, is applicable also to a recovery of all or part of the charges collected. The carrier by transporting and

the shipper by shipping and paying the charges must be held to have made and performed an illegal contract, from the consequences of which the law will not relieve either of them.

But plaintiff's theory, we believe, misinterprets the plain meaning of Section 4. That section is not directed solely against the rate for the short haul, but against relation between the rates to the intermediate point and the more distant point. It is true, the section declares it unlawful to charge more for the short haul than for the long, but the meaning would have been the same had the prohibition been against charging less for the long haul than for the short.

Section 3 of the Act relates to discrimination in general and Section 4 to one form of discrimination. This is demonstrated by the opinion of this court in Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447. That was an action for alleged violation of the long and short haul provision of Section 4 of the Commerce Act. It was decided in 1897 before the amendments which gave force to the Commerce Act and real power to the Commission, and before the decision of Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, which first announced the doctrine that the courts were without jurisdiction of matters intrusted to the Commission by the Commerce Act. No question of the jurisdiction of the court seems to have been raised. The following observations of the court at page 454 clearly define the nature of Section 4:

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for

shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant."

If Section 4 is a prohibition against one specific type of discrimination, a matter of relativity of rates, then the difference between the rates for the short haul and the long is not the measure of damages. In American Express Co. vs. Caldwell, 244 U. S. 617, a suit involving discrimination between intrastate and interstate rates, this court made the following observations at page 624:

"1. The nature of the Interstate Commerce Commission's order.

"In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the Express Companies, both to maintain their interstate rates and to raise,

to their level, the intrastate rates involved. The Shreveport case (Houston, East & West Texas Ry. Co. vs. United States), 234 U. S. 342. For, if the interstate rates are maintained, the discrimination can be removed only by raising the intrastate rates.

"But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."

In St. Louis etc. Ry. Co. vs. U. S., 245 U. S. at page 144 this further statement is found:

"Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. American Express Co. vs. Caldwell, 244 U. S. 617, 624."

To the same effect is Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816.

Section 1 of the Commerce Act forbids unreasonable rates; Section 2, the charging of greater or less compensation to one person than to others; Section 3, undue preference of and discrimination against persons and localities, and Section 4, charging more for a short haul than for a long haul. There are no degrees of unlawfulness created by these sections. It is as unlawful under the Act to charge unreasonable rates or to charge more or less to one person than to others, or prefer or discriminate against a person or locality, as it is to violate the long and short haul clause.

Section 6 requires carriers to publish schedules of their rates, to collect from all shippers the charges named in the schedules and no other. Since rates may be published which are unreasonable or otherwise in violation of one or more of the first four sections of the Act, there is an apparent conflict between Section 6 requiring collection of the published rates and the other sections forbidding the collection of unreasonable, preferential or discriminatory rates, or rates which violate the long and short haul clause.

This conflict has been recognized by this court in several decisions and by the Interstate Commerce Commission in numerous decisions. In Armour Packing Co. vs. U. S., 209 U. S. 56, a rebating case in which an agreement was made between several shippers and carriers for rates lower than those named in the published tariffs, this court clearly stated the binding effect of published rates. We quote from page 80, et seq.:

"It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

In the Elkins Act Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will be to

make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

In P. C. C. & St. L. Ry. vs. Fink, 250 U. S. 577, an action for an undercharge, this court said at page 581:

"The purpose of the act to regulate interstate commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure."

In Keogh vs. C. & O., 43 Supreme Court Reporter 47, decided November 13, 1922, a suit for damages under the Sherman Anti-trust Act, based on alleged ex-

cessive rates maintained by a carrier, the binding effect of a published rate was restated in the following language:

> "Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff can not be varied or enlarged by either contract or tort of the carrier."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, an action for the difference between the published rates paid by a shipper and the lower rates charged his competitor, a case to which we shall later refer on the subject of damages, this court at page 196, et seq., made the following clear statement of the effect of Section 6:

> "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. Armour Co. vs. United States, 209 U. S. 56,

83.) The tariff, so long as it was of force, was in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

The Commission in its decisions holding Section 6 paramount over other sections of the Act, has adopted the term "legal rate" as synonymous with the published rate and the term "lawful rate" as meaning a rate which does not violate any of the other sections of the act.

In Poor Grain Co. vs. C. B. & Q. Ry. Co., 12 I. C. C. 418, we find the following in the opinion of the Commission at page 423:

"The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points, and that it shall be unalterable by any act or omission by the carrier or the particular

shipper, or in any manner other than that provided by law."

And again at page 424 et seq:

"Besides the issues hereinbefore adverted to, reparation is demanded on another ground that lends further emphasis to the question here under consideration of the fixedness and inflexibility of a published rate. A rate may be lawful in the sense that it is the regularly published rate and therefore the only rate under which traffic may lawfully move, and yet at the same time be unlawful in the sense that it is excessive and unreasonable in amount. Its lawfulness as the published rate is to be tested by the mere inspection of the schedules on file with the Commission, and if found to have been published in conformity with the requirements of law that rate must in all cases be charged and actually collected by the carrier even though it may be excessive. Whether or not it is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as having a legitimate influence in rate making. But in no event may a carrier agree with a shipper that the published rate, under which shipments have been made, is too high and undertake to adjust it by collecting a less rate. *The publication fixes and makes the rate inflexible and unalterable,* as heretofore explained, *and that rate must be applied until changed in the manner required by law.* Nor may a carrier, when a rate has been duly canceled and a lower rate made effective, voluntarily refund from the freight charges already collected, and thus give the benefit of the new rate on shipments

that moved under the previous higher rate. This Commission alone has jurisdiction to authorize a refund to be made from the charges collected on previous shipments. And it can give such authority only upon an affirmative finding that such rate was excessive and unreasonable, and therefore unlawful. The complainant appeals to that jurisdiction in this petition. (Italics ours.)

In Interstate Remedy Company vs. American Express Co., 16 I. C. C. 436, the Commission restated the proposition thus at page 4:

"But even if it should eventually be held that a carrier may not lawfully make a lower rate upon a return shipment than would apply if it were an original shipment, we are of opinion that *the carrier may not plead the unlawfulness of its tariff to avoid extending the benefit thereof to a shipper.* While it has been repeatedly emphasized by the Commission that the shipper is put upon notice of a rate by the publication of the tariff, *it has not been held that a shipper must determine for himself the lawfulness of a rate, regulation, or practice, upon his peril.* The responsibility rests upon the carrier to have lawful rates and rules in effect, and *every shipper may with safety rely upon such rates without fear that they will be withdrawn as illegal after he has made shipment thereon, resting in the confidence that they are lawful so long as they are in force.* If subsequently found to be unlawful, the carrier is subject to penalty for the institution and maintenance of such rates or rules, but *the law does not contemplate that the shipper shall move upon any other theory than that the provisions of the*

carrier's tariff are in full compliance with the law's demands." (Italics ours.)

In Crescent Coal & Mining Co. vs. C. & E. I. R. R. Co., 24 I. C. C. 149, the effect of Section 6 is again stated. We quote at page 156:

> "The sole question to be determined is the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate under other sections of the act with its *legality* under section 6. *For example, a rate unreasonably high and unlawful in the sense of Section 1 may, nevertheless, be the legally established standard and rule of action under Section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute.* This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether knowingly in the usual course or inadvertently or for collusive or other improper purposes. * * * In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk-line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; *and even should it appear that*

this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * * * *

This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law but with the only construction which will preserve the chief function of section 6, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them." (Italics ours.)

These authorities demonstrate that it was the duty of the carriers in the instant cases to collect the published charges, even though such charges were violative of Section 4, a question later to be discussed; that if there was a violation of the Fourth Section it was a

form of discrimination which the carriers could remove voluntarily by lowering the short haul rate, raising the long haul rate, or by changing both rates in such manner as to correct the violation; or, on the other hand, the Commission might order the carriers to remove the violation by resorting to any one of these three expedients; that the Fourth Section specifically provides that it shall not be interpreted as authorizing the charging of as much for a short haul as for a long; that courts are powerless to fix rates, this being an administrative function committed to the Commission, and that the only way in which the rate to be charged to an intermediate point can be determined, in the absence of voluntary action by the carriers, is through the Commission.

So we find the decisions of the Interstate Commerce Commission full of cases involving violations of Section 4 of the Act, and such cases absent from the court reports until the decision of the Circuit Court of Appeals in this case resulted in the filing of a large number of similar cases in the courts. The Commission has consistently held that the mere fact of a Fourth Section violation does not give a shipper who pays the intermediate rate, a right of action for the difference between that rate and the rate to the more distant point, and that there may be no damage, or the damage may be more or less than the difference in rates. These decisions of the Commission are so numerous that regard for the length of this brief forbids listing them all. Several such cases are found in almost every recent volume of the Interstate Commerce reports.

A typical case is Iten Biscuit Co. vs. C. B. & Q. R. R. Co., 53 I. C. C. 729. The following quoted from the opinion at page 731 et seq. is illustrative:

> "With respect to the Fourth Section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the Fourth Section is absolute, the collection of higher charges from and to Omaha was unlawful per se, and the excessive charges must as a matter of law be refunded."

The opinion then discusses the cases of Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, and So. P. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, and then goes on as follows:

> "But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable per se and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and to consequent damage. In this instance, as we have already seen, there is no such proof."

This construction of the Fourth Section was adopted by the Commission as early as 1908 as is evidenced by Topeka Banana Dealers' Association vs. St. L. etc. R. Co., 13 I. C. C. 620, 627, decided in that year, and has been reannounced so frequently by the Commission that it should be followed by the courts unless manifestly incorrect. Heath vs. Wallace, 138 U. S. 573; U. S. vs. Cerecedo, 209 U. S. 337.

In addition to these reasons for holding exclusive initial jurisdiction to be in the Commission, we have here involved administrative questions which are clearly outside the jurisdiction of the courts. An inspection of the map attached to the fly leaf of this brief will disclose that geographically North Portland is nearer San Francisco by water than Portland; that shipments carried from San Francisco to Portland, and thence to North Portland, follow a route which substantially doubles back upon itself. In addition the Steamship Company's vessels before reaching Ainsworth Dock in the heart of the City of Portland, the regular landing place of the vessels, pass Terminal No. 4 at the boundary of the City. At this point connection may be had with the rail lines of Oregon-Washington Railroad & Navigation Company, and commodities transported to North Portland without going through the center of the City. The distance to North Portland via this route is substantially the same as the distance to Ainsworth Dock. As a matter of operating convenience the Steamship Company's vessels do not touch at North Portland or Terminal No. 4 on their way to Portland, but there is no physical reason why they should not do so, and it is within the power of the Commission to compel them to do so. The evidence discloses that no shipments

have ever been made on the Steamship Company's vessels to North Portland, which may account for the failure of the vessels to touch at that point. If shipments were actually offered to the Steamship Company for transportation to North Portland it would be a question for the Commission to determine whether the failure to touch at North Portland or Terminal No. 4 was a reasonable practice.

An apt illustration of a route which doubles back upon itself is found on the rail lines of Oregon-Washington Railroad & Navigation Company shown on the map. It will be observed that there are two lines running from Troutdale to Portland. The southerly line is more direct. The northerly line circles the northern and western limits of the City. Fairview is a station on the southerly line a short distance west of Troutdale. In practice the southerly line is used as a passenger line and the northerly lines as a freight line. Shipments of freight destined to points on the southerly line between Troutdale and Portland are in practice routed via the northerly line into the City, and thence switched easterly on the southerly line to point of destination, as, for instance, Fairview. This, of course, is merely a matter of company convenience. Nevertheless, by the route which such freight actually travels, Portland is intermediate to Fairview. Can a court ignore geography and hold that Portland is intermediate to Fairview merely because the carrier's tariffs may provide that freight destined to Fairview shall move via Portland? Clearly not. An administrative question would obviously be there involved as to whether such a route was a reasonable route.

The illustration used is not an imaginative supposition. This identical situation with Spokane, Washington, substituted for Portland, and Dishman, Washington, for Fairview, is now the subject of litigation in the District Court of the United States for Oregon.

There are additional reasons for holding the claims against the Director General to be within the exclusive jurisdiction of the Commission. Section 10 of the Federal Control Act, 40 Stat. L. 451, reads in part as follows:

> "Section 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such federal control or with any order of the President. * * *
>
> That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.
>
> Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President

as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of making the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said findings and certificate by the President, together with such recommendations as he may make."

It will be noted from the foregoing that the Director General, the agent of the President, was not made un-

qualifiedly subject to all laws, state and federal, but only in so far as those laws were not inconsistent with the Federal Control Act and any order of the President. It appears from the complaints that the President continued for the first few months of federal control the rates which he found in the tariffs of the carriers, and that on June 25, 1918, by General Order No. 28, the Director General of Railroads increased these rates, along with other rates throughout the United States, by twenty-five per cent (25%). These obviously were orders of the President and in so far as existing laws either state or federal, were inconsistent with those orders, they were of no effect.

Northern Pacific Ry. Co. vs. North Dakota, 250 U. S. 135, arose from the allowance by a state court of a peremptory writ of mandamus commanding the Director General of Railroads to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the Director General, and to collect only the lesser rates fixed in the tariffs on file with the Public Utilities Commission of the State. Under the laws of North Dakota such rates could not be changed without the approval of the Utilities Commission. This court reversed the Supreme Court of North Dakota, and explained the effect of Section 10 as follows:

> At page 143. "By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were au-

thorized to continue to perform their duties in accordance with their previous authority 'until and except so far as said Director shall from time to time by general or special orders otherwise provide.' Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: 'But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such.' "

And at page 148:

"No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the prop-

erty which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of Section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: 'That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.' These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute."

In Missouri Pacific vs. Ault, 256 U. S. 554, the court held inapplicable to the Director General a statute of a state providing a penalty for the failure by a railroad Company to pay promptly the wages of discharged employes.

In Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6, decided by this court November 7, 1921, General Order No. 18, issued by the Director General, prescribing the venue of suits, was upheld as against the statutes of Mississippi on the same subject, attention being called to the fact that Section 10 of the Federal Control Act "permitted enforcement of liabilities against carriers while under federal control only 'in so far as not inconsistent * * * with any order of the President.' "

The provision of Section 10 limiting the application of statutes to cases in which the statutes are not "inconsistent with any order of the President" refers specifically to federal laws as well as state laws and the common law. It subjects to this limitation Section 4 of the Interstate Commerce Act, and, indeed, the whole Interstate Commerce Act, except as the limitation is itself limited by the provisions in the last two paragraphs of Section 10, giving the Interstate Commerce Commission power to inquire into the justness and reasonableness of orders fixing rates, classifications, regulations and practices, and after full hearing to make such findings and orders as are authorized by the Commerce Act. It follows, therefore, that the rates maintained by the Director General were not subject to attack and are not now, except before the Interstate Commerce Commission.

At the termination of Federal control many claims were pending. The Transportation Act terminated federal control and necessarily with it went the provisions relating to suits against the Director General. Therefore, a new consent to be sued was given by Section 206 (a)-(g) of the Transportation Act. Section 206 (a) is a general section giving the right to bring actions, suits and proceedings in admiralty against an agent designated by the President in any court, which, but for federal control, would have had jurisdiction of the cause of action had it arisen against a carrier.

Paragraph (b) relates to service of process. Paragraph (c) is as follows:

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonablly prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under sub-division (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complants in the manner provided in

the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a)."

Paragraph (e) provides that final judgments, decrees and awards shall be paid out of a revolving fund created by other sections of the Act.

By an Act approved February 24, 1922 (42 Stat. L. 393), Paragraph (a) was amended by adding a limitation of one year after the date of the Commission's award for the filing of actions to enforce such awards. The same Act amended Section (c) by extending the time within which claims for over charges above the legal tariff charge could be filed with the Commission, to two years and six months.

Section 206 (a) is a general consent to be sued and is, of course, necessarily comprehensive in its terms. Section 206 (c) is, however, equally comprehensive in its own field. It covers every question which could arise out of the Interstate Commerce Act, and affords a complete remedy for any and all violations of that Act. Therefore, under elementary rules of statutory construction the particular part of the field covered by Section 206 (c) is taken out of the operation of Section 206 (a).

25 R. C. L. 1010:

"250. General and Particular Provisions.—It is an old and familiar rule, which is closely related to the doctrine of ejusden generis, and to the rule that where an act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act, that where

there is in the same statute a particular enactment, and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

Furthermore, the actions and suits authorized by Section 206 (a) might be brought within the varying periods of limitations found in state statutes, subject to a maximum limitation of two years from the termination of federal control, whereas, a uniform limitation of one year, except as to undercharges was placed by Section 206 (c) on proceedings before the Commission. This court in Phillips vs. Grand Trunk Ry., 236 U. S. 662, has held uniformity one of the principal objects of the Commerce Act, and that the requirement of the act that all shippers be treated alike necessitates a ruling that they are bound by the same statutes of limitation whether they bring their cases before the Commission or the courts. The same doctrine was reaffirmed in Kansas City Sou. R. Co. vs. Wolf, 43 Supreme Court Reporter, 259. If, under the Transportation Act, a shipper may elect to bring an action for a violation of the Fourth Section in a court or before the Commission, the period of limitation applicable to his cause of action depends upon the forum which he chooses and uniformity is gone.

IF SECTION 4 APPLIES TO SHIPMENTS WHOLLY BY WATER, WAS IT VIOLATED?

In discussing this question the shipments involved should be divided into three classes, those moving prior to Federal control, those moving during Federal control and those moving after Federal control.

As to those in the first class, there was no violation of Section 4 as between the Portland rates and the North Portland rates, because geographically North Portland is nearer by water to San Francisco than Portland, and if any traffic were offered for North Portland it would only be a matter of carrier convenience whether its vessels should touch at North Portland on the way to Portland, or deliver the shipments to the rail carrier at Terminal No. 4, thus in the one case making North Portland intermediate and in the other making it on a different route and one no longer than that to Portland. The location of Portland as the terminus of two of a carrier's rail lines from Troutdale with Fairview located on the passenger line, aptly illustrates the point which we are making with reference to Portland and North Portland. This argument of course does not apply to Astoria, to which a few of the shipments made by plaintiff's assignors were consigned, since Astoria is geographically intermediate on the water route.

But in the case of Astoria as well as Portland, Section 4 was not violated because the carriers did not in fact charge more on shipments to Astoria and Portland than on shipments to North Portland, for the very good reason that there were no such shipments to North Port-

land. A rate on sugar to North Portland was carried in the joint water and rail tariff, but no sugar was ever transported to North Portland, either by the Steamship Company alone or in combination with any rail carrier.

Section 4 provides that "it shall be unlawful for any common carrier * * * to *charge* or *receive* any greater compensation in the aggregate *for the transportation* * * *, of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." The words "charge" or "receive" "for the transportation" carry with them the implication that actual shipments shall be involved. No cause of action is given to anyone merely because unlawful rates are carried in a tariff. To give ground for complaint, a charge must have been made and collected on an actual shipment to the intermediate point.

Of course, the words "charge or receive for transportation" can have no different meaning in respect of shipments to the more distant point than as to those to the intermediate point. A carrier can not "receive" more for the short haul than the long, without actually collecting charges for both. Likewise, if it has not "charged" for the short haul until an actual shipment has moved and payment of the rate been made or at least demanded, it can not "charge more" for a short haul than for a long haul until it has collected or demanded charges for actual shipments to both places involved. Again, the inhibition of the Section is against charging or receiving *"for the transportation* * * * of like kind of property for a shorter than for a longer distance." There was no transportation to the more

distant point and therefore there was neither charging nor receiving for it.

This interpretation of the Section has the support of Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447—a Fourth Section case to which we have previously referred, wherein it is stated at page 454 that "the burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. * * * So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials, shippers in Nebraska had been given a lesser rate. * * *"

"It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of the railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another."

Judson, on Interstate Commerce, 3rd Edition, p. 529, in discussing Section 8 of the Act, states: "A discriminating rate must be actually charged to make an offense or cause of action under the Act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487; E. Dist. of Penn. (1902)."

The Commission has given the Section a similar interpretation. In Topeka Banana Dealers' Association vs. St. L. S. F. R. R. Co., 13 I. C. C. 620, 627, a Fourth Section case, the Commission held, "The complaint here is that bananas moved from New Orleans

through Kansas City to Burlington, Iowa, and that the Kansas City rate is higher than that to Burlington. There is a joint rate quoted in the tariffs to Burlington via Kansas City, but no bananas seem to have ever moved over that route. It is nothing more than a paper rate, bananas destined for Burlington moving through St. Louis."

In Anaconda Copper Mining Co. vs. Director General, 64 I. C. C. 136, 139, the Commission said: "Prior to August 31, 1920, the rates to Rome were not in accordance with the long-and-short-haul provision of the Fourth Section. The rate to Utica was neither charged nor collected and complainant made no attempt to prove damage by reason of the collection of higher rates to Rome. Following Iten Biscuit Company vs. C. B. & Q. R. R. Co., 50 I. C. C. 724; 53 I. C. C. 729, no award of reparation can be made."

In Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487, the District Judge of the Eastern District of Pennsylvania, referred to the effect of paper rates in the following language:

> "For present purposes it must be assumed that the rate complained of was discriminating, but I still think that a mere paper rate, which is never carried into effect, and is therefore simply a proposition to carry for a specified sum, is not such a violation of the interstate commerce act as to prevent the carrier from recovering freight from other than the theoretically favored shippers. It is discrimination in fact, and not a mere intention to discriminate, that is punishable; and in the case before the court there was no evidence that a pound of coal had been carried to be sold in the market

by any other shipper than the defendants. Hence no rival of the defendants was benefited by the unaccepted rate, and no harm was done to their business."

There is also the question whether transportation to Portland and Astoria wholly by water, and transportation to North Portland partly by water and partly by rail, could be considered as transportation "over the same line or route." The line or route to Portland and Astoria was named in a local tariff and the line or route to North Portland in a joint water and rail tariff.

In Chicago & N. W. R. Co. vs. Osborne, 52 Fed. 912, Mr. Justice Brewer held that two companies by making a joint tariff established a new line independent of the local line of either, and that a joint rate to a more distant point might be lower than the local rate of one of the carriers to an intermediate point without violating Section 4. This principle was followed in U. S. vs. Mellen, 53 Fed. 229; I. C. C. vs. Cincinnati etc. R. Co., 56 Fed. 925, 936, affirmed 162 U. S. 184; Allen & Lewis vs. O. R. & N. Co., 98 Fed. 16, and was finally made absolute by Parsons vs. C. & N. W. Ry., 167 U. S. 447, 455, decided in 1896.

At the time these decisions were announced the Fourth Section forbade a higher charge for a short haul than for a long haul "over the same line." Subsequently the words "or route" were added after the word "line." The effect of this amendment has not, to our knowledge, been stated by this court. It does not, in our judgment, detract from the force of the decisions quoted. The act now forbids charging more for a short haul than for a long over the same line, thus forbidding that relationship between local rates and likewise forbids the charg-

ing of more for a short haul than a long over the same route, thus forbidding that relationship between joint rates, but still does not prohibit that relationship between joint rates and local rates.

During Federal control rates initiated and maintained by the Director General were under "Order of the President." All statutes, State or Federal, insofar as inconsistent with such orders, were, by Section 10 of the Federal Control Act, made inapplicable. Section 4 of the Commerce Act, like any other statute, was therefore not effective as against the Director General's rates. We have previously quoted from Northern Pacific vs. North Dakota, 250 U. S. 135; Missouri Pacific vs. Ault, 256 U. S. 554, and Alabama etc. Ry. vs. Journey, 42 S. C. A., 6, to that effect. It follows there was no violation of Section 4 during Federal control.

But, in fact, the Commission's Fourth Section Order 7316, dated May 27, 1918, granted authority to the Director General to charge more for the short haul than for the long, whenever General Order No. 28 was in conflict with the Fourth Section. The *second* and *third* paragraphs of *this order* are as follows:

> "And whereas the said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provisions of Section 4 of the act to regulate commerce as will permit said carriers under Federal control to file schedules containing rates, fares, charges, or classifications containing departures from aforesaid provisions of Section 4, enabling carriers under Federal control, in the present emergency, to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated

and prescribed by said General Order No. 28 of May 25, 1918:

It is Ordered: That in those instances in which carriers under Federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under Federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges and classifications which exceed the aggregate of the intermediate rates, fares, and charges, and classifications, as set forth in General Order No. 28 of the Director General the said carriers be, and they are hereby authorized to establish such rates, fares, charges and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce."

That this was intended to apply to Fourth Section departures previously existing, is evidenced by the Commission's Fourth Section Order 7601 of March 1, 1920, which reads in part as follows:

"The question of the relief granted by Fourth Section Order 7316, General No. 17, being under consideration; and

It appearing that the relief granted by the said order applied to all rates, fares, charges and classifications increased in pursuance of General Order No. 28 of the Director General of Railroads, including those which theretofore conformed to the

provisions of the Fourth Section and those not in accord therewith not authorized by orders of this Commission or protected by appropriate Fourth Section application for relief."

The rates charged after Federal control were not in violation of the Fourth Section for a still further reason not applicable to prior shipments. When the roads were returned to their owners, Section 209 of the Transportation Act guaranteed that, for the period of six months from the termination of Federal control, their income should be not less than half the amount named as annual compensation in their contracts with the Government.

Section 208-a continued existing rates in effect and forbade the carriers during the six months period to reduce them. The language of this Section follows:

> "Sec. 208 (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge unless such reduction or change is approved by the Commission."

The contention of the plaintiff is that this Section refers only to rates legaly in effect and that the rates to

Portland were not legally in effect. We have endeavored to show that the rates named in the Director General's tariff were legally in effect, but even if we assume they were not, they were actually in effect; that is, they were being collected. Section 208 (a) does not differentiate between rates legally in effect and those illegally in effect, but commands the carriers not to reduce the rates which it finds. It is unthinkable that the carrier during the six months' guaranty period could not transport sugar to Portland at all, but the rates named in the tariff were continued in force or there were no rates at all, and the prohibition of Section 6 against transporting commodities for which no tariff rates had been published applied. It is also an unreasonable and harsh construction of this paragraph which would require carriers to determine at their peril whether the rates they found in the Director General's tariffs were "legally" in effect.

Our researches have disclosed any decision by this Court interpreting Section 208 (a). The Supreme Court of Utah, however, has passed on the question of the effect of this Section upon the long and short haul provision of the Utah statutes, and has held that the Section suspended the operation of the Utah statute during the guaranty period. Wasatch Coal Co. vs. Baldwin, 208 Pacific (Utah) 1109. To the same effect is Public Service Commission vs. New York Central R. R. Co., 185 N. Y. S., 268.

Obviously Section 208 (a) was intended to continue some rates in effect. Unless it continued in effect the rates named in the Director General's tariffs at the termination of Federal control, there were no rates to be continued in force. This in itself demonstrates the fallacy of plaintiff's contention.

THE MEASURE OF DAMAGES IS NOT THE DIFFERENCE BETWEEN THE RATES. NO OTHER EVIDENCE OF DAMAGE WAS OFFERED SO THERE CAN BE NO RECOVERY.

On the subject of damages plaintiff offered no evidence other than the fact that his assignors had paid the published charges to Portland and Astoria on the shipments of sugar listed in his complaints. His theory is that the excess of the Portland and Astoria rates over the North Portland rate constitutes an overcharge above the legally published rate, and that, having established the fact that his assignors paid the excess he is entitled to recover it without other proof of damage.

This contention is refuted by Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, several federal decisions, and a long list of decisions by the Interstate Commerce Commission.

In Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, a Fourth Section case, this Court pointed out that the mere difference in rates is not evidence of damage. We quote at page 459:

> "But these 'might be's' interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made

any arrangement with any consignee in any of those points for the receipt and sale of his corn, or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges might be absolutely and fully true, and yet he, with the knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago. Surely it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong; for, if he would not under any circumstances have shipped to New York, was compelled by his contracts or any other consideration to ship to Chicago, he cannot say that he was injured by his ignorance of the rate to New York. The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act'. So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and had been charged local rates he might have recovered any excess

thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, there was before the court an action for damages for the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed to plaintiff's competitors. There was no allegation or proof that plaintiff had been damaged except that he paid higher rates than his competitors. This court at page 198 stated plaintiff's contention and commented on it as follows:

"It contends, however, that this was not necessary for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route. And such a right of action was expressly given in Section 2 of the original Bill to Regulate Commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier 'shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.'

The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes —not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that Section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States v. Freight Association,* 166 U. S. 290, 318; *Maxwell v. Dow,* 176 U. S. 581, 601. Section 2 of the original Senate Bill said nothing about *damages* but in the case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Section 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to 'the person injured'—and, of course, to the extent of the injury."

Again at page 202:

"For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharges, and while one count of the complaint asserted a

claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under Section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be *'liable to the person injured thereby*

*for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fee.'* In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899."

In Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816, (District Court of Mass.) plaintiff, after securing a finding by the Commission that the absorption of certain switching charges to certain docks used by plaintiff's competitors without a corresponding absorption of charges for switching to the dock used by plaintiff, was discriminatory, brought suit for the excess of the rates he had to pay over those paid by his competitors. After a review of the decisions of this court on the subject, the court held:

"The plaintiff paid no more than it was legally obliged to pay. There may have been disadvantages in using the Commonwealth Dock which more than offset the saving in transportation charges from it. Everything considered, it may have been as profitable to import over the National Dock and pay the switching charges, as over the Commonwealth Pier and not pay them. If so, the plaintiff's competitors, who used the Commonwealth Pier, gained no advantage by so doing, and the plaintiff sustained no damage because of the unlawful rate accorded them."

To the same effect are Homestead Coal Co. vs. Des Moines Electric Co., 226 Fed. 49; Atchison, etc., R.

Co. vs. Spiller, 246 Fed. 1, 20; Clark Bros. Coal Mining Co. vs. Penn. R. R. Co., 238 Fed. 642, and Lehigh Valley R. Co. vs. American Hay Co., 219 Fed. 539.

Substantially all cases involving Section 4, which preceeed the cases at bar, were brought before the Commission. It would be a task of no small magnitude to assemble all of the cases of the Commission holding that in such cases evidence of the difference in rates is no proof of damage. We have already referred to a few of them and will refrain from citing more because plaintiff will concede that to be the long established ruling of the Commission.

ALL CLAIMS ANTEDATING FEBRUARY 12, 1919, ARE BARRED, BECAUSE NOT BROUGHT WITHIN TWO YEARS.

The complaints in both cases were filed February 12, 1921. Therefore, under the doctrine of Phillips vs. Grand Trunk Ry., 236 U. S. 662, those arising prior to February 12, 1919, were barred by the two-year limitation contained in Section 16 of the Commerce Act. The two year bar was pleaded by the Steamship Company as to all claims arising prior to Federal control. The Director General did not plead the limitation as to those claims arising between the beginning of Federal control and February 12, 1919. But under the decisions of this court this is a defense which cannot be waived. In the Phillips case it was said at page 667: "Under such a statute the lapse of time not only bars the remedy but destroys the liability (Finn vs. U. S. 123 U. S., 227, 232), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction." And again, "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required to be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a Railroad Company to plead the Statute of Limitations as against some and to waive it as against others would be to pre-

fer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished."

The Circuit Court of Appeals in the cases at bar sought to differentiate the Phillips case on the ground that there another shipper had gone before the Commission and that Phillips could therefore claim no different limitation from that to which the other shipper was subject.

However, since the decision of the Circuit Court of Appeals, this court in Kansas City Sou. R. Co. vs. Wolf, decided February 19, 1923, 43 Supreme Court Reporter, 259, dismissed this distinction as untenable and applied the two-year limitation to all claims for violation of the Interstate Commerce Act, whether there was precedent application to the Commission by other shippers or otherwise.

But it is contended that Section 206 (f) of the Transportation Act reading as follows:

> "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control",

operated to toll the statute. Assuming this to be true, the claims antedating December 15, 1916, are still barred and a great many claims are involved in the action against the Steamship Company which moved prior to that date.

But the statute cannot, in our judgment, be given that effect. The Phillips and Wolf cases decided by this court hold that the lapse of two years destroys the

cause of action. The two-year period on all claims against the Steamship Company antedating federal control, and all claims against the Director General antedating February 28, 1918, had expired prior to the passage of the Transportation Act (February 28, 1920). The causes of action on such claims were therefore no longer existent at the time the Transportation Act was passed and Congress was powerless to revive them.

In Eberhart vs. U. S. 204 Fed. 884, a case in which an attempt was made to revive a cause of action which had been destroyed by lapse of time, the court observed at page 892:

> "The vice of the Act of 1911 is that it makes a new contract for these sureties where they had been for months before its enactment free from all liability to this bank, to the materialmen, and the laborers, a contract of which they had no notice, and to which they never assented, whereby they were made liable to the bank for $23,693.44. * * * This was done, if it was done at all, not by any process of law, but by the arbitrary act of a legislative body, without notice, trial, or hearing. An Act of Congress which has such an effect not only violates the fifth amendment to the Constitution, but is beyond the powers of the legislative department of a republican government, and void."

CONCLUSION.

Summarizing our contentions, they are as follows:

First: That in view of Section 15 of the Commerce Act providing that the Commission shall not have the right "to establish any route, classification, practice or rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water", Section 4 of the act did not apply to the shipments involved in these cases, since they were wholly by water.

Second: All of the claims involved against the Director General are held by plaintiff under assignments from various shippers. Such assignments are void under Section 3477 Revised Statutes, and plaintiff has no cause of action.

Third: A part of the shipments involved in each case moved and charges were collected during the period that the Steamship Company's ships were being operated by the Shipping Board, and as to such shipments no liability can be fastened on either the Steamship Company or the Director General.

Fourth: No application to the Interstate Commerce Commission for relief was made on any of the claims involved in either action. The actions belong to the class of which the Interstate Commerce Commission has exclusive original jurisdiction. The Fourth Section is a statute relating to a form of discrimination and not merely one declaring the intermediate rate unlawful. It specifically provides that it shall not be construed as authority for charging the same rate to an

intermediate point as to the more distant point. Therefore, no court could find that the published rate to a more distant point was the rate which should have been charged to the intermediate point.

Fifth: Section 6 of the Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation, except when an applicable rate is contained in a published tariff. This section is supreme over those forbidding unreasonable, preferential and discriminatory rates.

Sixth: Discrimination may be removed by lowering one rate, raising the other, or changing both, and the only authority to direct the method by which the discrimination shall be removed in the absence of voluntary action by the carrier involved, is lodged in the Interstate Commerce Commission.

Seventh: A further administrative question is involved because North Portland is geographically a shorter distance from San Francisco by water than Portland, the route via Municipal Terminal No. 4 to North Portland is no longer than the route to Portland, and it is for the Commission to say whether a route which doubles back upon itself is a reasonable route.

Eighth: Section 10 of the Federal Control Act lodged exclusive jurisdiction of cases against the Director General arising out of the Interstate Commerce Act in the Interstate Commerce Commission.

Ninth: Section 206 (c) of the Transportation Act requires all actions against the Director General arising out of the Commerce Act brought after Federal control to be brought before the Commission.

Tenth: There was no violation of Section 4 because North Portland is geographically closer to San Francisco by water than Portland.

Eleventh: There was further no violation of the Fourth Section because in fact the carriers did not charge or receive more for transportation to North Portland than to Portland and Astoria. There were no shipments to North Portland, and no sum whatever was ever charged or received for any transportation to that point, although a paper rate was named in the joint water and rail tariff.

Twelfth: There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates of the Steamship Company and the Director General and the rates to North Portland were joint water and rail rates.

Thirteenth: The rates initiated and maintained by the Director General were under order of the President, and all statutes inconsistent with such orders were, by Section 10 of the Federal Control Act, made inapplicable to the Director General.

Fourteenth: If the rates be considered as violative of the Fourth Section, authority to continue them was given by the Commission's Fourth Section Order 7316.

Fifteenth: The rates charged after Federal control were made conclusively lawful by Section 208 (a) of the Transportation Act and the Steamship Company was forbidden to lower them during the six months' guaranty period.

Sixteenth: No damages were proven, the difference in rates not being the measure of damages.

Seventeenth: All claims antedating February 12, 1919, are barred because not brought within two years.

Respectfully submitted,

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ARTHUR C. SPENCER,
C. E. COCHRAN,
JOHN F. REILLY,
Attorneys for Plaintiffs in Error.

JOHN F. FINERTY,
Attorney for Plaintiff in Error, James C. Davis.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 209

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

McCAULL-DINSMORE COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 29, 1923

CERTIORARI AND RETURN FILED AUGUST 10, 1923

(29,370)

(29,370)

SUPREME COURT OF THE UNITED STATES.

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[fol. 1] STATE OF MINNESOTA:

IN SUPREME COURT

1922

STATE OF MINNESOTA,
County of Hennepin:

DISTRICT COURT, 4TH JUDICIAL DISTRICT

McCAULL-DINSMORE COMPANY, Plaintiff

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

COMPLAINT

Plaintiff in the above entitled action alleges and respectfully shows to the court:

First. That during all the time hereinafter mentioned, the plaintiff was and still is doing business under the firm name and style of McCaull-Dinsmore Company.

Second. That during all the time hereinafter mentioned, the defendant was and still is a railway corporation and common carrier, of interstate merchandise by rail, for hire, between the city of St. Paul, Minnesota, and the city of Great Falls, Montana, passing into and through the town or station of Benchland, Montana, and other [fol. 2] intermediate points and places, owning, maintaining and operating all of the facilities necessarily used in connection with its business as an interstate carrier of merchandise.

Third. That between the dates of August 23, 1913, and September 3, 1914, the plaintiff at the station of Benchland, Montana, offered for shipment to the defendant company thirty-seven cars of wheat, to be transported by the defendant company over its line of railway from the said station of Benchland, Montana, to the station or cities of Minneapolis, Minnesota, and Duluth, Minnesota; that the defendant accepted the said thirty-seven cars of wheat for shipment as aforesaid, and that the plaintiff thereby became liable and indebted to the defendant company for the amount of the legal and lawful rate for the transportation of the said wheat between the points aforesaid.

Fourth. That the defendant in the due course of transportation delivered the said wheat to the plaintiff, or the plaintiff's consignee at the town or station of Minneapolis, Minnesota, and Duluth, Minnesota, and collected from the plaintiff at or prior to the delivery of the said wheat, a sum amounting to two cents (8.02) per cwt. in excess of the legal and lawful rate on each carload of wheat so transported and delivered.

Fifth. That the defendant between the dates hereinbefore set forth and on the quantity of wheat so transported as herein alleged, [fol. 3] as is more particularly set forth on lists or statements hereto attached marked "Exhibit A, B," and made a part hereof, which lists give the dates of shipment of the said cars in question and the amount collected by the defendant in excess of the lawful rate. That the defendant did collect and take from the plaintiff and convert to its own use at the said station of Minneapolis, Minnesota, and Duluth, Minnesota, the sum of five hundred ninety and 26/100 dollars ($590.26), which money is the lawful property of the plaintiff, and which money has been since the dates herein set forth, retained and kept by the defendant who has refused to return it to the plaintiff, although the return thereof has been often demanded.

Wherefore, plaintiff prays judgment against the defendant for five hundred ninety and 26/100 dollars ($590.26) with interest thereon according to law, together with the costs and disbursements of this action.

John P. Devaney, Attorney for Plaintiff, 819-825 1st Natl. Soo Bldg., Minneapolis, Minnesota.

[fol. 4] EXHIBIT A TO COMPLAINT

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	86,570	259.71	17.31	"
8-27	220529	"	66,750	200.25	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	43.16	"
[fol. 5]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-6	17361	"	61,140	183.42	12.23	"
8-21	22531	"	86,980	260.94	17.39	"

EXHIBIT A TO COMPLAINT—Continued

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
8-23	207475	GN	75,470	226.41	15.09	Duluth.
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 6]

EXHIBIT B TO COMPLAINT

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.00	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	257.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 7] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ANSWER

Comes now the defendant and for its answer to plaintiff's complaint, denies each and every allegation therein contained not herein specifically admitted.

The defendant admits that the allegations contained in paragraphs 1 and 2 of plaintiff's complaint are true.

Further answering said complaint and for a further defense thereto, defendant alleges that if it collected from the plaintiff the freight charges on the cars of grain set forth in plaintiff's complaint, said charges were the charges provided by the defendant's tariffs, regularly published and filed with the Interstate Commerce Commission as required by law, and that said charges were made and collected more than four years prior to the commencement of the above entitled action and that no complaint for the recovery of damages on account of the collection of said charges was filed with the Interstate Commerce Commission within two years after plaintiff's alleged cause of action accrued or in this court at any time prior to the commencement of the above entitled action.

Wherefore, defendant prays that plaintiff take nothing and that defendant may be hence dismissed with its costs and disbursements herein.

Dille, Hoke, Krause & Faegre, Attorneys for Defendant, 300 Security Building, Minneapolis, Minnesota.

[fol. 8] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

REPLY

Plaintiff herein for its reply to the answer of the above named defendant:

Denies each and every allegation of new matter in said answer contained.

Wherefore, plaintiff prays for judgment against the defendant as by its complaint it hath demanded.

John P. Devaney and Theodore W. Thompson, Attorneys for Plaintiff, 1132-56 Builders Exchange, Minneapolis, Minn.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

Settled Case

The above entitled action having been regularly placed upon the September 1919-1920 general term calendar of said court, came on for trial in its order and was tried before the Honorable John H. Steele, one of the judges of said court, without a jury, on the 25th day of June, 1920, at the court house in the city of Minneapolis, Hennepin county, Minnesota.

Messrs. John P. Devaney, Theodore W. Thompson and H. C. Wilson, appeared as counsel on behalf of the plaintiff and Messrs. Dille, Hoke, Krause & Faegre, and F. G. Dorety appeared on behalf of the defendant, whereupon the following proceedings were had.

[fol. 9] The parties made and filed the following stipulation of facts, and submitted said cause for trial and determination thereon, said stipulation being in words and figures as follows, to-wit:

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties in the above entitled action by and through their respective attorneys that in the trial of said action, the relevant and material facts are as follows:

First. That the plaintiff herein is a corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota and is entitled to maintain this action in its behalf.

Second. That the defendant herein is a corporation and common carrier for hire of property between points in the state of Minnesota and points in Montana and other states and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

Third. That the lines or routes owned and operated by the defendant extend among other places from Billings, Mont., to Minneapolis and Duluth, Minnesota.

Fourth. That the distance from Billings, Montana, to Minneapolis is 1,253 miles and to Duluth 1,291 miles over defendant's lines extending from Billings, Montana, through Benchland, Great Falls and Havre, Montana, to Minneapolis and Duluth, Minnesota; [fol. 10] that Benchland, Montana, is a station on said line of defendant between Billings and Great Falls, Montana; that the distance from Benchland, Montana, to Minneapolis, Minnesota, is 1,101 miles and to Duluth, Minnesota, 1,139 miles; and that shipments transported by defendant from Billings, Montana, to Minne-

apolis, Minnesota, and Duluth, Minnesota, pass through Benchland, Montana, en route and from thence pass over the same lines and routes as do shipments from said Benchland.

Fifth. That between the dates of August 22, 1913, and September 3, 1914, the plaintiff herein delivered to the defendant at the station of Benchland, Montana, thirty-seven (37) carloads of wheat as more particularly described in Exhibits "A" and "B," attached hereto and made a part hereof for transportation over the defendant's lines to Minneapolis and Duluth, Minnesota; that the defendant accepted said shipments, transported them in due course to Minneapolis and Duluth; and there delivered the same to the plaintiff, or to the plaintiff's consignees.

Sixth. That at or about the time of the delivery of said shipments, defendant collected and received for the transportation thereof from the plaintiff, freight charges in the amounts set forth in said Exhibits "A" and "B," based upon a rate of thirty cents ($.30) per 100 pounds; and that said freight charges were paid and borne by the plaintiff.

Seventh. That defendant's tariff I. C. C. No. A3720 published [fol. 11] and filed with the Interstate Commerce Commission effective August 5, 1913, and in effect during all the time herein mentioned, named a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana (Index 100), and a rate of twenty-eight cents ($.28) per 100 pounds from Billings, Montana (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points.

Eighth. That Section 4 of said Act to Regulate Commerce as amended June 18, 1910, provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less [fol. 12] for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months

after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission."

Ninth. That defendant during all the time herein mentioned was not authorized by said Interstate Commerce Commission to charge a lower rate for the transportation of wheat in carloads, from Billings, Montana, to Minneapolis and Duluth, Minnesota, than it contemporaneously charged for the transportation of like shipments from Benchland, Montana, to Minneapolis, Minnesota, and Duluth, Minnesota; but that on or about December 3, 1910, the defendant filed before the Interstate Commerce Commission of the United States an application signed and sworn to by W. P. Kenney, its assistant traffic manager, reading as follows:

"The Great Northern Railway Company, through its assistant traffic manager, petitions the Interstate Commerce Commission for authority to continue class and commodity rates for the transporta-[fol. 13] tion of all freight as covered in GN GFO No. 21600, Joint Tariff I. C. C. A-3162, and superseding issues not involving basis changes, according to the rate, group or zone adjustments as designated in said tariff or superseding issues under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points," as illustrated by the following:

"Northern Pacific distance St. Paul to Billings, Mont., is 890 miles, first class rate $1.95.

The Great Northern distance St. Paul to Billings, Mont., is 1,300 miles. To engage in this traffic, we must make the same rates for $1,300 miles as the Northern Pacific do for 890 miles, but in doing so we should not be compelled to pull down all our intermediate rates. In other words, we should not be compelled to make as a natural rate for 1,300 miles the rate which the Northern Pacific makes as a natural rate for 890 miles.

The first class rate from St. Paul to Great Falls is $2.10, this being the normal rate, distance 1,067 miles.

Omaha to Billings via the C. B. & Q. is 892 miles, Omaha to Billings via the C. N. & W., Sioux City and Great Northern 1,547 miles, first class rate Omaha to Billings $1.95; to Great Falls $2.25; relative adjustment on commodities, etc.

A copy of the tariff mentioned is attached hereto and made a part hereof.

The existing rate adjustments in said tariff have been deter-[fol. 14] mined by geographical, commercial and competitive conditions.

This application is based upon the desire of petitioner to meet by direct haul over longer lines or routes competitive conditions created at more distant points by shorter and more direct workable routes."

That thereafter, the said commission acknowledged receipt of said application by letter reading as follows:

"Washington, December 21, 1910.

Mr. W. P. Kenney,
Asst. Traffic Manager,
Great Northern Railway Company,
St. Paul, Minn.

DEAR SIR:

The application of the Great Northern Railway Company for relief under the Fourth Section of the Act to Regulate Commerce, dated December 3, 1910, your number —, has been received.

In referring to this application please give commission's number 827.

Very respectfully, (Signed) Edward A. Moseley, Secretary."

Tariff No. G. N. GFO No. 21600 ICC A-3162.

That said application was pending before the Interstate Commerce Commission during the time herein mentioned and had not been finally determined by said commission.

That said Tariff G. N. GFO 21600 referred to in said application [fol. 15] contained grain rates from Billings to the Eastern Terminals referred to in the complaint, and also from said station of Benchland, Montana, to said terminals, of 32 cents per hundred pounds, and was the only Great Northern tariff carrying commodity rates on grain between said points at said time.

That said tariff was superseded effective July 25, 1911, by G. N. GFO 22600, I. C. C. A-3400, which continued the same basis of rates on grain from Billings and other Montana stations, including Benchland, to said terminals.

That said last named tariff was superseded during the year 1912 as to commodities other than grain by Agent Countiss' Joint Tariff I. C. C. 949, and that as to eastbound grain rates said tariff was superseded by G. N. GFO 23721, I. C. C. A-3630, effective January 10, 1913, carrying the same eastbound grain rates above referred to.

That said last named tariff was superseded by G. N. GFO I. C. C. A-3720, effective August 5, 1913, being the tariff above referred to in paragraph Seventh of this stipulation. That the tariffs herein referred to were during the times above referred to the only tariffs carrying commodity rates on grain over the lines of the Great Northern Railway Company from Billings and Benchland, Montana, to the Eastern Terminals above referred to.

Tenth. That the differences between the charges collected from the plaintiff by defendant and the charges that would have accrued [fol. 16] at the rate of 28 cents per 100 pounds on each of said shipments are correctly set forth in the column entitled "Overcharges," in said Exhibits "A" and "B" attached hereto, and aggregate the sum of five hundred ninety and 26/100 dollars ($590.26); and that if it be determined that the charges collected as aforesaid were unlawful to the extent that they exceeded the charges that

would have accrued at the rate of twenty-eight (28) cents per 100 pounds as contended by the plaintiff, the plaintiff is entitled to a judgment against the defendant for five hundred ninety and 26/100 dollars ($590.26) together with interest thereon and the costs and disbursements of this action.

John P. Devaney, Theodore W. Thompson, and H. C. Wilson, Attorneys for Plaintiff. Dille, Hoke, Krause & Faegre and F. G. Dorety, Attorneys for Defendant.

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	85,670	259.71	17.31	"
8-27	220529	"	66,750	200.25	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	13.16	"
[fol. 18]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-3	17351	"	61,140	183.42	12.23	"
8-21	22534	"	86,980	260.94	17.39	"

EXHIBIT A TO STIPULATION—Continued

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
8-23	207475	Int.	75,470	226.41	15.09	Duluth.
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 19]

EXHIBIT B TO STIPULATION

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.00	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	257.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 20] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled proceeding came on for hearing before the undersigned, one of the judges of said court, at the September, 1919, general term thereof, on the 25th day of June, 1920, without a jury, a jury having been duly waived.

H. C. Wilson, Esq., and Theodore W. Thompson, Esq., appearing as counsel on behalf of the plaintiff, and F. G. Dorety, Esq., and Messrs. Hoke, Dille, Krause and Faegre appeared as counsel for the defendant, and the court having the testimony adduced by the respective parties and duly considered the same, together with the stipulation of facts filed by the parties, makes the following

Findings of Fact

1. That during all the time mentioned in the pleadings the plaintiff herein was, and still is a corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota, and is entitled to maintain this action in its behalf.

2. That during all of said time the defendant herein was, and still is a corporation and common carrier for hire of property between points in the state of Minnesota and points in Montana and other states and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

3. That the lines or routes owned and operated by the defendant [fol. 21] extend among other places from Billings, Montana to Minneapolis and Duluth, Minnesota.

4. That the distance from Billings, Montana to Minneapolis is 1,253 miles and to Duluth 1,291 miles over defendant's lines extending from Billings, Montana, through Benchland, Great Falls, and Havre, Montana to Minneapolis and Duluth, Minnesota; that Benchland, Montana is a station on said line of defendant between Billings and Great Falls, Montana; that the distance from Benchland, Montana, to Minneapolis, Minnesota, is 1,101 miles and to Duluth, Minnesota 1,139 miles and that shipments transported by defendant from Billings, Montana, to Minneapolis, Minnesota and Duluth, Minnesota, pass through Benchland, Montana enroute, and from thence pass over the same lines and routes as do shipments from said Benchland.

5. That between the dates of August 22, 1913, and September 3rd, 1914, the plaintiff herein delivered to the defendant at the station of Benchland, Montana, thirty-seven (37) carloads of wheat as more particularly described in Exhibits "A" and "B" attached hereto and made a part hereof for transportation over the defendant's lines to

Minneapolis and Duluth, Minnesota; that the defendant accepted said shipments, transported them in due course to Minneapolis and Duluth, and there delivered the same to the plaintiff, or to the plaintiff's consignees.

[fol. 22] 6. That at or about the time of the delivery of said shipments, defendant collected and received for the transportation thereof from the plaintiff, freight charges in the amounts set forth in said Exhibits "A" and "B," based upon a rate of thirty cents ($.30) per 100 pounds; and that said freight charges were paid and borne by the plaintiff.

7. That defendant's tariff I. C. C. No. A-3720 published and filed with the Interstate Commerce Commission effective August 5, 1913, and in effect during all the time herein mentioned, named a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana (Index 100), and a rate of twenty-eight cents ($.28) per 100 pounds from Billings, Montana (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points.

8. That Section 4 of said Act to Regulate Commerce as amended June 18, 1919, provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates sub-[fol. 23] ject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission."

9. That defendant during all the time herein mentioned was not authorized by said Interstate Commerce Commission to charge a lower rate for the transportation of wheat in carloads from Billings, Montana to Minneapolis and Duluth, Minnesota than it contempo-

raneously charged for the transportation of like shipments from Benchland, Montana to Minneapolis, Minnesota and Duluth, Minnesota; but that on or about December 3, 1910, the defendant filed be-
[fol. 24] fore the Interstate Commerce Commission of the United States an application signed and sworn to by W. P. Kenney, its assistant traffic manager, reading as follows:

"The Great Northern Railway Company, through its assistant traffic manager, petitions the Interstate Commerce Commission for authority to continue class and commodity rates for the transportation of all freight as covered in G. N. GFO No. 21600, joint tariff I. C. C. A-3162, and superseding issues not involving basis changes, according to the rate, group or zone adjustments as designated in said tariff or superseding issues under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points," as illustrated by the following:

"Northern Pacific distance St. Paul to Billings, Mont., is 890 miles, first class rate $1.95.

The Great Northern distance St. Paul to Billings, Mont. is 1300 miles. To engage in this traffic we must make the same rate for 1,300 miles as the Northern Pacific do for 890 miles, but in doing so we should not be compelled to pull down all our intermediate rates. In other words, we should not be compelled to make as a natural rate for 1,300 miles the rate which the Northern Pacific makes as a natural rate for 890 miles.

The first class rate from St. Paul to Great Falls is $2.10, this being the norminal rate, distance 1,067 miles.

Omaha to Billings via the C. B. & Q. is 892 miles, Omaha to Billings via C. & N. W., Sioux city and Great Northern 1,547 miles
[fol. 25] first class rate Omaha to Billings $1.95; to Great Falls $2.25; relative adjustment on commodities, etc.

A copy of the tarff mentioned is attached hereto and made a part hereof.

The existing rate adjustments in said tariff have been determined by geographical, commercial and competitive conditions.

This application is based upon the desire of petitioner to meet by direct haul over longer lines or routes competitive conditions created at more distant points by shorter and more direct workable routes."

That, thereafter, the said commission acknowledged receipt of said application by letter reading as follows:

"Washington, December 21, 1910.

Mr. W. P. Kenney,
Asst. Traffic Manager,
Great Northern Railway Company,
St. Paul, Minn.

DEAR SIR:

The application of the Great Northern Railway Company for relief under the Fourth Section of the Act to Regulate Commerce, dated December 3, 1910, your number—has been received.

In referring to this application please give commission's number 827.

Very respectfully (Signed) Edward A. Moseley, Secretary."

Tariff No. G. N. GFO No. 21600 I. C. C. A-3162.

[fol. 26] That said application was pending before the Interstate Commerce Commission during the time herein mentioned and had not been finally determined by said commission.

That said tariff G. N. GFO 21600, referred to in said application contained grain rates from Billings to the eastern terminals referred to in the complaint, and also from said station of Benchland, Montana, to said terminals, of 32 cents per hundred pounds, and was the only Great Northern tariff carrying commodity rates on grain between said points at said time.

That said tariff was superseded effective July 25, 1911, by G. N. GFO 22600, I. C. C. A-3400, which continued the same basis of rates on grain from Billings and other Montana stations, including Benchland, to said terminals.

That said last named tariff was superseded during the year 1912, as to commodities other than grain by Agent Countiss' Joint Tariff I. C. C. 949, and that as to eastbound grain rates said tariff was superseded by G. N. GFO 23721, I. C. C. A-3630, effective January 10, 1913, carrying the same eastbound grain rates above referred to.

That said last named tariff was superseded by G. N. GFO I. C. C. A-3720, effective August 5, 1913, being the tariff above referred to in paragraph Seventh of this stipulation. That the tariffs herein referred to were during the times above referred to the only tariffs carrying commodity rates on grain over the lines of the Great [fol. 27] Northern Railway Company from Billings and Benchland, Montana, to the eastern terminals above referred to.

10. That in Railroad Commissioners of Montana v. B. A. & P. Ry. Co., 31 I. C. C. 641, 652, the Interstate Commerce Commission said:

"The rates from Billings to the twin cities and other points in Minnesota, Wisconsin, and other states are less than the rates concurrently applicable on like traffic from intermediate points in the Great Northern Railway. Defendants claim that these violations of the fourth section are protected by their fourth section application No. 827. At the time this application was filed the rate on wheat from Billings to the twin cities was observed as a maximum at intermediate points on the Great Northern Railway; hence this application cannot be construed as protecting any fourth-section violations now existing as to the rate of wheat from Billings and intermediate points to the territory involved. These violations have been brought about by reason of the fact that in 1913, these carriers reduced the rate from Billings from 32 to 28 cents per 100 pounds, a reduction of 4 cents, without making equal reductions from intermediate stations taking the same rate. No application was filed with the commission for authority to establish the relation of rates this brought about, and such establishment must therefore be con-

sidered as having been made contrary to the rule of the fourth section and without authority from the commission."

[fol. 28] 11. That the differences between the charges collected from the plaintiff by defendant and the charges that would have accrued at the rate of 28 cents per 100 pounds on each of said shipments are correctly set forth in the column entitled "overcharges," in said Exhibits "A" and "B", attached hereto, and aggregate the sum of five hundred ninety and 26/100 dollars ($590.26).

As Conclusions of Law

The court finds that the plaintiff is entitled to judgment against the defendant in the sum of $590.26 with interest at the rate of 6% per annum on each of the several sums set forth in the column entitled "overcharges," in said Exhibits "A" and "B," attached hereto, from the dates upon which each of said several sums were paid by the plaintiff to defendant; together with its costs and disbursements herein.

Let judgment be entered accordingly.

By the Court, John H. Steele, Judge.

A stay of 30 days is granted from and after the date of the filing of this order dated September 23, 1920. S.

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	85,670	259.71	17.31	"
8-27	220529	"	66,750	200.24	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	13.16	"
[fol. 30]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-4	17351	"	61,140	183.42	12.23	"

8-21	22534	"	86,980	260.94	17.39	"
8-23	207475	"	75,470	226.41	15.09	"
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 31]

EXHIBIT B TO FINDINGS

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.60	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	275.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 32] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

STIPULATION FOR SETTLED CASE

It is hereby stipulated by and between the parties to the above entitled action that the foregoing is a full, true and correct transcript of the evidence offered and proceedings had on the trial of the above entitled action, and the said transcript may be signed, certified, settled and allowed as and for a settled case herein, containing all the evidence offered and proceedings had upon the trial of said cause.

Dated this 27th day of January, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff.
Hoke, Krause & Faegre, F. G. Dorety, Attorneys for Defendant.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ORDER SETTLING CASE

Having examined the foregoing transcript of evidence, together with such evidence received on the trial of the above entitled action, and having found the same conformable to the truth, the same is, pursuant to the foregoing stipulation of the parties, hereby signed, settled, certified and allowed, as and for a settled case herein, and I hereby certify that the same contains a true and correct transcript of the evidence and proceedings had, and the whole thereof, upon said trial.

Dated this 30th day of January, 1922.

W. W. Bardwell, Judge.

[fol. 33] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

NOTICE OF MOTION FOR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW OR FOR A NEW TRIAL

To the above-named plaintiff and to John P. Devaney and Theodore W. Thompson, its attorneys:

Please take notice, that at a special term of the above named court to be held in the court house of said Hennepin county on Thursday the 9th day of December, 1920, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, the above named defendant will move the court, as follows:

I

That the findings of fact and conclusions of law heretofore made and filed herein be amended in the following respects, to-wit:

(a) By striking out the words "this stipulation" appearing in the sixth line from the last in paragraph 9, of said findings of fact and by inserting in lieu the words "these findings."

(b) By adding to and inserting in said findings of fact as paragraphs 12 and 13, the following additional findings or words in substance, to-wit:

"12. There is no evidence that any shipments were actually made from Billings, Montana, to the destinations and during the period referred to in these findings, or that any shipments actually moved at the rate of 28 cents per hundred pounds referred to in finding No. [fol. 34] 7, or that the defendant actually assessed or received any charge based upon said rate of 28 cents per hundred pounds.

13. There is no evidence that the plaintiff suffered any loss or damage as a result of the publication by defendant of the rate of 28 cents per hundred pounds from Billings, Montana, referred to in finding No. 7, except the fact that the plaintiff actually paid the charge of 30 cents per hundred pounds mentioned in finding No. 7, or 2 cents per hundred pounds in excess of said 28 cent rate."

(c) By striking out the entire conclusions of law herein and by inserting in lieu thereof a conclusion of law in words, or in substance, as follows to-wit:

"1. The mere publication of the lower rate for the longer distance from Billings, in the absence of evidence that the defendant actually charged and received said rate on shipments actually moved, is not a violation of Section 4, of the Act to Regulate Commerce.

2. In the absence of evidence of actual damage, the plaintiff is not entitled to recover the difference between the rate which it paid and bore, and the lower rate published by defendant for a longer distance.

3. The plaintiff is not entitled to any relief in this action and the action should be dismissed and defendant is entitled to judgment against the plaintiff for its costs and disbursements herein.

4. This court has no jurisdiction to enter judgment against the defendant in this action.

[fol. 35] 5. That plaintiff is not entitled to recover against the defendant and that said defendant is entitled to judgment against plaintiff for its costs and disbursements herein. Let judgment be entered accordingly."

You are further notified that said motion for amendments, as hereinabove set forth, will be made and based upon all the files and

records herein, and upon the transcript of proceedings had at the trial, as the same may be settled by the court herein as and for the settled record of this case, and upon the grounds and for the reasons that the findings which said defendant asked to have stricken are not supported by the evidence and are contrary to law, and that the additional findings of fact and substituted conclusions of law requested by said defendant are required by the evidence and the law applicable to the case.

II

You are further notified that if said motion for amended findings of fact and conclusions of law be denied in whole, or in substance, this defendant will then and there further move the court for a new trial of said cause upon the following grounds and for the following reasons to-wit:

"That the decision of the court is not justified by the evidence and is contrary to law."

You are further notified that said motion will be made and based upon the files and records in this action, and upon the record proposed for settlement at the same time as the same may be settled by the court.

[fol. 36] You are further notified that said defendant will then and there move the court for an order extending the stay herein until a reasonable time after the determination of the foregoing motions.

Dille, Hoke, Krause & Faegre and F. G. Dorety, Attorneys for Defendant, 300 Security Building, Minneapolis Minnesota.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ORDER DENYING MOTION FOR AMENDED FINDINGS, ETC.

The above entitled matter came on for hearing before the undersigned, one of the judges of said court, upon a motion on the part of the defendant to amend the findings of fact and conclusions of law as set forth in said notice of motion, and in the event that the said motion be denied in whole or in substance, then for a motion on the part of defendant for a new trial, upon the ground and for the reasons set forth in said notice of motion; Mr. F. G. Dorety and Messrs. Dille, Hoke, Krause & Faegre, appearing for defendant in support of said motion, and Mr. W. W. Patterson and Messrs. Devaney & Edwards, appearing for plaintiff in opposition thereto. The court being advised in the premises, upon the arguments presented, upon the briefs filed, and upon all the files, records and proceedings had, it is

Ordered that said motions and each of them be and the same are in all respects denied.

[fol. 37] Dated at Minneapolis, February 9, 1922.

By the Court,

W. W. Bardwell, Judge of District Court.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

JUDGMENT

The above entitled action coming on regularly for trial at the September, 1919, general term of the above entitled court on the 25th day of June, 1920, before one of the judges of said court, without a jury, a jury having been duly waived by both parties, and the court having heard the testimony adduced by the respective parties and duly considered the same, together with the stipulation of facts filed by the parties, and the arguments and briefs of the parties, made, in writing, its findings of fact and conclusions of law filed herein on October 1, 1920, and in which conclusions of law the court found that the plaintiff is entitled to judgment against the defendant in the sum of $590.26 with interest at the rate of six per cent per annum on each of the several sums set forth in the column entitled "overcharges" in the Exhibits "A" and "B" attached to said findings and conclusions, from the dates of payment shown in said exhibits, together with plaintiff's costs and disbursements herein, and ordered judgment to be entered accordingly:

Now, therefore, by virtue of the premises, it is ordered and adjudged that the plaintiff herein have and recover from the defendant herein said sum of $590.26 and said interest which is $288.38, [fol. 38] together with plaintiff's costs and disbursements herein taxed at $14.00, amounting in all to the sum of $892.64.

Dated this 5th day of July, 1922.

Walter A. Ryberg, Clerk of the Above-entitled Court, By Gordon J. Mangan, Deputy.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

NOTICE OF APPEAL

To Devaney & Edwards and W. W. Patterson, attorneys for the above-named plaintiff, and to Walter A. Ryberg, clerk of said District Court:

Please take notice, that the above named defendant, Great Northern Railway Company, appeals to the Supreme Court of the state

of Minnesota, from that certain judgment of the said District Court entered herein, on the 5th day of July, A. D. 1922, and from the whole thereof.

Dated this 6th day of July, A. D. 1922.

F. G. Dorety and Koke, Krause & Faegre, Attorneys for Defendant.

Due and personal service of the within notice of appeal is hereby admitted this day, July 6th, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff. Walter A. Ryberg, Clerk of District Court, By Geo. H. Hemperley, Deputy.

[fol. 39] In the District Court of Hennepin County

(Title of Cause)

Stipulation Waiving Bond on Appeal

Plaintiff hereby waives the furnishing and filing of bond for costs and supersedeas bond on appeal herein, and hereby stipulates with said defendant that all proceedings herein be stayed pending the final determination of said action.

Dated this 6th day of July, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff; F. G. Dorety and Hoke, Kause & Faegre, Attorneys for Defendant.

[fol. 40] STATE OF MINNESOTA:

SUPREME COURT

1922

23141

[Title omitted]

APPELLANT'S BRIEF

Hoke, Krause & Faegre, 300 Security Bldg., Minneapolis, Minnesota; F. G. Dorety, R. J. Hagman, 1120 Great Northern Bldg., St. Paul, Minnesota, Attorneys for Appellant.

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[fol. 44] [Title omitted]

Statement of the Case

This is an appeal from a judgment entered in the District Court for the Fourth Judicial District against appellant, Great Northern Railway Company, in the sum of $892.64 in favor of respondent, McCaull-Dinsmore Company, in an action brought to recover freight charges collected in alleged violation of the long and short haul clause of Section 4 of the Interstate Commerce Act.

There are no disputed facts in this case, the cause having been submitted for trial upon a stipulation of facts (Rec. p. 8). The [fol. 45] errors complained of by appellant are erroneous conclusions of law made by the court from those facts. The facts so far as necessary to present the questions involved in this appeal are:

Appellant is a common carrier owning and operating a railway extending from Duluth and Minneapolis westward to the Pacific Coast with a branch line extending from Havre, Montana, on its main line southerly through Benchland to Billings, Montana. The distance from Billings to Minneapolis is 1,253 miles and to Duluth 1,291 miles. Benchland is located on appellant's line 152 miles north of Billings and consequently that many miles less distant than Billings from Minneapolis and Duluth over the same route. Shipments from Billings to Minneapolis and Duluth pass through Benchland.

For a number of years the appellant's tariff rate for the transporta-

tion of wheat was 32¢ per cwt. for both Billings and Benchland to Minneapolis and Duluth. On August 5, 1913, appellant duly filed and published a tariff naming a rate on wheat to said terminals of 28¢ from Billings and 30¢ from the less distant point of Benchland. Thus Benchland obtained a reduction in its rate of 2¢ per cwt. Billings, although more distant from the terminals than Benchland, was given a reduction of 4¢ per cwt., making its rate 2¢ lower than the new rate from Benchland, for the reason that the Northern Pacific Railway Company operated a more direct line between Min- [fol. 46] neapolis and Billings, a distance of 882 miles—approximately 371 miles shorter than the appellant's line, and published a rate on wheat from Billings to Minneapolis of 28¢. For the purpose of enabling it to participate in the transportation of wheat from Billings to Minneapolis in competition with the shorter and more direct line of the Northern Pacific, the appellant published the 28¢ rate from Billings referred to above, but that competition did not exist as to Benchland, which is a local point on the Great Northern, and appellant was not compelled for business reasons to reduce the rate from that point below its normal level. The same situation existed with reference to the rates to Duluth. Section 4 of the Interstate Commerce Act, as amended June 18, 1910, reads in part as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

* * * * * * *

Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be [fol. 47] relieved from the operation of this section.

* * * * * * *

And provided further, that rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission. * * *"

As appears from the stipulation of facts (Rec. pp. 12 and 13), the appellant on December 3, 1910, had petitioned the Commission "for authority to continue class and commodity rates for the trans-

portation of all freight" as covered by certain tariffs "under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points." The situation intended to be covered by this petition was illustrated by reference to the St. Paul to Billings first class rate as compared with a higher rate to Great Falls, which is an intermediate point (Rec. p. 13). This application was still pending before the Commission and undetermined at the time the shipments here in question moved (Rec. p. 14). The tariff referred to in the application covered grain rates, and was the only Great Northern tariff carrying commodity rates on grain (Rec. p. 15). The Great Northern Railway Company believed and claimed that, under the last proviso of the Fourth Section quoted above, the Fourth Section violations com- [fol. 48] plained of in this case were protected by the said application, and this belief continued until the Commission decided otherwise in the case of Railroad Commissioners of Montana vs. Butte, Anaconda & Pacific, 31 I. C. C. 641, which was decided October 5, 1914. In that case the Commission held that, since the rates here in question had been established by a tariff published subsequent to the said application, they would not be considered as covered by the application, and that consequently the Fourth Section violations should be removed (31 I. C. C. 652). Thereupon the Great Northern promptly cancelled the lower rate to Billings, and thus removed the Fourth Section violation.

While the lower rate to Billings remained in force and during the period from August 22, 1913, to September 3, 1914, respondent shipped 37 carloads of wheat over appellant's line from Benchland to Minneapolis and Duluth. Appellant collected and respondent paid for this transportation at the rate of 30¢ per cwt., which was named in the tariffs as the rate on wheat from Benchland.

Just before the expiration of six years after these shipments moved, that is, in the year 1920, respondent instituted this action in the District Court to recover the difference of 2¢ per cwt. between the 30¢ rate it paid from Benchland and the 28¢ rate published from Billings.

The lower court found that the collection of the two cents in question was unlawful and that respondent by reason of this fact alone [fol. 49] was entitled to recover the same, regardless of whether any competitor had shipped any grain from Billings over the longer route at the lower rate, and regardless of whether respondent had been damaged in any way by the fact that the lower rate had been published for the longer haul.

There is no claim or evidence that the 30¢ rate from Benchland paid by respondent was unreasonable or excessive in itself, or that respondent would have been entitled to a lower rate than 30¢ had the appellant not published a 28¢ rate from the competitive point of Billings. On the contrary, the fact is that after the lower rate from Billings was cancelled the rate from Benchland continued to be 30¢, and the respondent continued to make shipments thereunder without any complaint. The 28¢ rate which was made by the Northern Pacific from Billings to Minneapolis, applicable over

its short line of 882 miles, would presumably have been the normal charge for the same length of haul over the Great Northern. As the distance from St. Paul over the Great Northern increased the rate would naturally increase and did increase until it reached 30¢ at Benchland. There is no question but that this was perfectly proper in all respects, except for the one fact that when it reached the still more distant point of Billings the appellant published the lower 28¢ rate in order to meet the Northern Pacific charge.

We want to emphasize the fact that this is not the usual case of a Fourth Section violation where the higher intermediate rates is [fol. 50] put in through oversight and later reduced to make a proper adjustment. On the contrary, it is a case where the Benchland rate was intentionally and deliberately maintained on a normal basis, both before, during and after the time when the tariff in question was effective. Instead of being a case where the intermediate rate was an oversight, it is a case where the lower rate for the longer haul was based upon a mistaken assumption, that is, upon the supposition that proper application for relief had been made. When the mistake in the assumption was discovered the higher intermediate rate was not reduced, but the lower rate for the longer distance was increased.

[fol. 51]

Assignments of Error

I

The lower court erred in ordering judgment for respondent for the following reasons:

(a) The undisputed evidence showed that the court was without jurisdiction.

(b) The undisputed evidence showed that there was no violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act.

(c) There was no evidence that respondent suffered any injury or was damaged in any way by reason of the publication by appellant in its tariffs of a higher rate from Benchland than from the more distant point of Billings.

II

The court erred in denying appellant's motion to amend the findings of fact made by the court by adding thereto findings in substantially the following words:

"12. There is no evidence that any shipments were actually made from Billings, Montana, to the destinations and during the period referred to in these findings, or that any shipments actually moved

at the rate of 28 cents per hundred pounds referred to in finding No. 7, or that the defendant actually assessed or received any charge based upon said rate of 28 cents per hundred pounds.

[fol. 52] "13. There is no evidence that the plaintiff suffered any loss or damage as a result of the publication by defendant of the rate of 28 cents per hundred pounds from Billings, Montana, referred to in finding No. 7, except the fact that the plaintiff actually paid the charge of 30 cents per hundred pounds mentioned in finding No. 7, or 2 cents per hundred pounds in excess of said 28 cent rate."

III

The court erred in denying appellant's motion to strike out the entire conclusions of law made by the court and to insert in lieu thereof a conclusion of law in words or substance as follows:

"1. The mere publication of the lower rate for the longer distance from Billings, in the absence of evidence that the defendant actually charged and received said rate on shipments actually moved, is not a violation of Section 4, of the Act to Regulate Commerce.

"2. In the absence of evidence of actual damage, the plaintiff is not entitled to recover the difference between the rate which it paid and bore, and the lower rate published by defendant for a longer distance.

"3. The plaintiff is not entitled to any relief in this action and the action should be dismissed and defendant is entitled to judgment against the plaintiff for its costs and disbursements herein.

"4. This court has no jurisdiction to enter judgment against the defendant in this action.

"5. That plaintiff is not entitled to recover against the defendant and that said defendant is entitled to judgment against plaintiff for [fol. 53] its costs and disbursements herein. Let judgment be entered accordingly."

IV

The Court erred in failing to dismiss the complaint for the reason that any cause of action which plaintiff may have is barred by the statute of limitations.

[fol. 54] ARGUMENT

We call attention at the outset to the fact that the court's jurisdiction and the rights and liabilities of the parties to this proceeding must be determined exclusively by the federal statutes and by the common law principles accepted and enforced by the federal courts, as this court has held in the case of Carbic Mfg. Co. v. Western Express Co., 149 Minn. 467, where it is said:

"The shipment was in interstate commerce. That interstate commerce is now governed exclusively by the federal statutes and 'by the common-law principles accepted and enforced by the federal courts' has become too thoroughly established to require the citation of authorities. Consequently we must look to, and follow, the decision of the federal courts in so far as they have determined the questions which arise in respect to such commerce."

I

Plaintiff's action is barred by the statute of limitations.

Section 16 of the Interstate Commerce Act as it existed prior to the amendment made February 28, 1920, read in part as follows:

"* * * All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement [fol. 55] of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after."

In the case of Phillips v. Grand Trunk Western Railway Company, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, the Supreme Court construed this provision of the statute as fixing a limitation of two years for the commencement of an action to recover freight charges collected in violation of the Interstate Commerce Act when the action is brought in court as well as when brought before the Interstate Commerce Commission. This was an action instituted in the Circuit Court of the United States for the Eastern District of Michigan by a shipper for the recovery of an overcharge in connection with numerous interstate shipments of lumber. At page 666 the Court says:

"But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that, 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; provided, that claims accrued prior to the passage of this act may be presented within one year.' 34 Stat. 586.

[fol. 56] "In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909,—less than two years after the validity of the Commission's order was sustained by the Supreme Court,—but more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose.

"3. It is argued, however, that under the Conformity Act (R. S. 914), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232) *whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.* This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *To have one period of* [fol. 57] *limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction;* or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others *would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.* The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action." (Italics ours.)

As plaintiff's cause of action is predicated on a violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act, and was not instituted until almost six years after the cause of action accrued, under the holding of the Supreme Court in the Phillips case the action must be dismissed as barred by the statute of limitations requiring such actions to be commenced within two years.

[fol. 58] II

The trial court was without jurisdiction and the action should be dismissed for that reason.

It is our contention that in order to permit of recovery in this case the Court must have jurisdiction to determine not only that the 30¢ rate from Benchland fixed by appellant's tariff and paid by respondent was unlawful before it can give respondent relief, but must also have jurisdiction to determine what was a lawful and proper rate, for obviously the measure of the respondent's relief must be limited by that. We contend that the trial court was without jurisdiction to determine either of these questions for the reason that they were administrative questions exclusively, within the jurisdiction of the Interstate Commerce Commission.

Congress, by the Interstate Commerce Act approved February 4, 1887, and the numerous amendments thereto, has undertaken an elaborate regulation and control of common carriers engaged in interstate commerce. Section 6 of that Act compels carriers to state all their rates, rules and regulations in printed tariffs which must be filed with the Interstate Commerce Commission and published, and makes it unlawful for a carrier to transport a shipment between two stations unless the rate upon which it will be transported is first so filed and published. The carrier primarily has the right and it is its duty to fix the charges for which it will perform transportaiton [fol. 59] services and when such rates are named in tariffs which are filed with the Commission they become the lawful rates, and neither the shipper nor the carrier may depart from those rates without subjecting themselves to a penalty. Only the Interstate Commerce Commission has the power to declare tariff rates unlawful and fix the lawful rate. But in order that the rates fixed by the carrier in its tariff may be found lawful when attacked before the Commission the carrier must observe several cardinal principles in establishing them: These principles are contained in Sections 1, 2, 3 and 4 of the Interstate Commerce Act, and are customarily refered to by traffic men and the Interstate Commerce Commission by the numbers of the sections of the Act containing them. These sections, at the time plaintiff's shipments moved, read as follows:

"Sec. 1. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or [fol. 60] property, subject to the provisions of this act, then it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier

shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful * * *."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a [fol. 61] longer distance: Provided, however, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission * * *."

The United States Supreme Court in the familiar case of Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 Law Ed. 553, held that since the enactment of the Interstate Commerce Act courts are without power to determine whether or not a rate established by a carrier in accordance with the provisions of the Act is unjust or unreasonable, notwithstanding section 22 of the act providing that "nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies," for the [fol. 62] reason that such power is vested by the act exclusively in the Interstate Commerce Commission. The court found that if this were not so the purpose of the act would be defeated. Instead of obtaining uniformity through the action of a single body skilled in determining rate questions different courts and juries throughout the country would render conflicting judgments and verdicts which would result in preferences and discriminations, would lead to fa-

voritism and the enforcement of one rate in one jurisdiction and a different one in another.

In the later case of Robinson v. B. & O. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 Law Ed. 288, it was held that the courts were equally without jurisdiction to determine whether or not a rate established by a carrier in accordance with the Act was unjustly discriminatory. The principle is now unquestioned that no court has the power to determine whether or not a rate duly published and filed as required by the Act is either unreasonable, unjustly discriminatory or unduly prejudicial, and as a correlative, that no court has the power to determine what would have been a reasonable, non-discriminatory and non-prejudicial rate, for a shipment theretofore made. The Interstate Commerce Commission was established for the purpose of determining the lawfulness of freight rates and empowered to award reparation to shippers from whom it finds that unlawful rates have been exacted by carriers.

[fol. 63] It is apparent from the provisions of the Interstate Commerce Act, quoted above, that in order to be lawful a rate must not be unreasonable in violation of Section 1, must not be unjustly discriminatory in violation of Section 2, must not be unduly preferential or prejudicial in violation of Section 3, and must not violate the long and short haul clause of Section 4. It cannot be said that a rate is lawful merely because it does not contravene the Fourth Section. It must not be violative of Sections 1, 2 and 3 as well, in order to be a lawful rate. A rate of 28¢ from Benchland would comport with the Fourth Section and at the same time the Interstate Commerce Commission might find that that rate was intrinsically unreasonable in violation of Section 1, or that it was unjustly discriminatory in violation of Section 2, or unduly preferential of Benchland, or unduly prejudicial to Great Falls or some other locality either north or south of Benchland on appellant's line, in violation of Section 3. The court has no jurisdiction to determine that 28¢ was the lawful rate from Benchland in that it conformed to the requirements of Sections 1, 2 and 3 of the Act, and since a rate may be lawful so far as Section 4 is concerned and at the same time unlawful so far as Sections 1, 2 or 3 are concerned, it is apparent that the court had no power to determine that 28¢, or any other rate, was the lawful rate from Benchland, for to do so necessarily and unavoidably involves a determination that the rate found lawful not only satisfied the Fourth Section, but was reasonable, non-discriminatory and non-
[fol. 64] prejudicial, and only the Interstate Commission has the power to make such a finding.

That the determination of a lawful rate depends upon more than an observance of the Fourth Section is illustrated by the language of the United States Supreme Court in the Intermountain Rate Case, 234 U. S. 476, 34 Sup. Ct. 986, 58 Law Ed. 1408. At page 485 the Court says, in discussing the Fourth Section as amended June 18, 1910:

"From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper

circumstances to justify the awarding of relief from the long and short haul clause *and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections,* it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or so to speak the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, *would not* [fol. 65] *only be inimical to the provision of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and third section.* But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discrimination as to whether the *request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.*" (Italics ours.)

Section 4 makes it "unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." The sole effect of this language is to make the higher rate from the nearer point unlawful with the result that the carrier subjects itself [fol. 66] to a penalty for violating the act. To say that this language automatically makes the published rate from the more distant point the lawful rate from the nearer point contrary to the express wording of the tariff, is to read something in to the Act that is not there. Furthermore, to read such an implication into the Fourth Section would be inconsistent with the theory of the entire Interstate Commerce Act. After Congress specifically condemns a rate that is either unjust, unreasonable, unduly discriminatory or unduly preferential, it is absurd to say that it intended by the Fourth Section that when a carrier, contrary to law, publishes a higher rate for a shorter than for a longer haul that the rate from the more distant

point automatically and conclusively becomes the lawful rate from the nearer point, immune from the operation of Sections 1, 2 and 3 of the Act. Congress by the Fourth Section merely took away from the carriers the power to establish, without first obtaining permission from the Commission, higher rates for shorter than for longer hauls, and did not withdraw from the Commission its exclusive power to determine what the lawful rate from the nearer point should be in case the carrier disregards the provisions of the Fourth Section.

Section 6 of the Interstate Commerce Act provides in part as follows:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as de-
[fol. 67] fined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The only rate from Benchland named in any of appellant's tariffs was 30¢. If that rate is unlawful under the Fourth Section the result is that no lawful rate from Benchland existed, as the only way of establishing a lawful rate is to file and publish a tariff naming the rate. We have then, if respondent's argument is sound, a case where the appellant violated the provisions of Section 6 of the Act quoted above, in that it transported shipments between Benchland and Minneapolis without having a lawful tariff rate therefor. Sections 13, 15 and 16 of the Act provide that any person complaining of "anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof," may apply to the Commission by petition, and the [fol. 68] Commission is empowered, after investigation, either after complaint by a shipper or upon its own motion, in case it determines that any complainant "is entitled to an award of damages under the provisions of this Act for a violation thereof" to "make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." The appellant's action in transporting a shipment without having a lawfully published tariff rate therefor, if the 30¢ rate was unlawful as contended by respondent, is a violation of the Interstate Commerce Act for which the Commission may award reparation, and the Commission has in such cases determined what would have been a lawful rate for the transportation in view of Sections 1, 2, 3 and 4 of the Act. See American Smelting & Refining Co. v. L. V. R. R. Co., 56 I. C. C. 195, 201.

It is thus apparent that the respondent was not barred from obtaining any relief it is entitled to by applying to the Interstate Commerce Commission, merely because it paid charges for transportation for which there was no tariff rate, as distinguished from a case where a shipper pays a tariff rate which is afterwards found by the Commission to have been unreasonable or discriminatory. The courts have no more jurisdiction to determine the administrative question of what would have been a lawful rate for a transportation service rendered without first publishing a rate therefor as required by Section 6, than they have to determine the administrative question of whether a published rate is reasonable and non-discriminatory. As [fol. 69] we have already stated, when the court attempted to fix 28¢ in this case as the lawful rate from Benchland, the effect of its action was necessarily and unavoidably to determine that that rate is lawful in view of Sections 1, 2 and 3, as well as in view of Section 4, because no rate can be lawful unless it satisfies the requirements of Sections 1, 2 and 3 as well as Section 4. If this case was pending before the Interstate Commerce Commission, where it should have been brought instead of before the court, the Commission in determining what the lawful rate from Benchland was certainly would not merely select a rate that would not be higher from Benchland than from Billings and establish that as the lawful rate from Benchland, without considering whether that rate also would be reasonable, non-discriminatory and non-prejudicial to shippers and localities in competition with Benchland as required by Sections 1, 2 and 3. Yet that is the very thing that the court below attempted to do when it fixed 28¢ as the lawful rate from Benchland.

In the case of Wickwire Steel Co. v. N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 420, 422, the Commission said:

"Even though the Commission in the case of an increased rate always is to consider whether it is just and reasonable, it is not precluded from considering the rate from other viewpoints, such as that of its preferential or discriminatory character. In view of the general import of the language of the paragraph taken as a whole, to argue [fol. 70] the contrary would seem to be to torture the plain meaning of the act into a restricted sense in nowise necessarily inferable from its terms.

* * * * * * *

"Under this conclusion that the proposed rates were unreasonably high, manifestly the fact that they had been published to remove a rate factor indicating a violation of the fourth section could not be accepted as a justification for the change."

Furthermore, the question of whether or not the 30¢ rate published in the tariff as applicable from Benchland and paid by respondent was in fact violative of Section 4, is in itself an administrative question which only the Commission can determine. To declare that rate unlawful would require a finding as to whether or not the lower rate from a longer distance was for a "like kind of prop-

erty," whether it was "over the same line or route in the same direction," whether the shorter distance was "included within the longer distance," whether the carrier actually charged or received the lower rate for the longer distance, whether the rate in question was existing "at the time of the passage of this amendatory act," and whether it was properly protected by an application to the Commission. These are also administrative questions to be determined before it can be said that the 30¢ rate was an unlawful rate.

Moreover, if any court has jurisdiction in this particular case the [fol. 71] jurisdiction of the Federal court is exclusive. Section 9 of the Interstate Commerce Act provides in part:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may *either make complaint to the Commission as hereinafter provided for, or may bring suit* in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, *in any district or circuit court of the United States of competent jurisdiction;* but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (Italics ours.)

And Section 22 provides in part:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act."

At common law the shipper has a remedy in court for the refund of rates which were per se unreasonable, but if the rate charged was reasonable he had no common law remedy because of the fact that a lower rate was charged for a longer distance. This right is purely a creature of the statute. However, it is immaterial for the purpose of determining the jurisdiction whether respondent in this case could recover under the common law, as its cause of action is predicated [fol. 72] upon the Fourth Section of the Interstate Commerce Act. Section 9 clearly states that to recover damages for the violation of the act suit must be filed either with the Interstate Commerce Commission or with the United States District Court. No state court, therefore, has jurisdiction of this action.

Fourth Section.

In Darnell v. Illinois Central, 190 Fed. 656, the first head note reads as follows:

"Jurisdiction of a claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by Interstate Commerce Act, Feb. 4, 1887, c. 104, sec. 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159) to the Interstate Commerce Commission or a District or Circuit Court of the United States, and the provision of section 16 of the act, as amended by Act June 18, 1910, c. 309, sec. 13, 36 Stat. 554,

extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the commission, and on which it has made awards which have not been compiled with."

In Siggins v. Chicago & N. W. Ry. Co., 140 N. W. 1128, the second head note reads as follows:

"Under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, sec. 9, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), authorizing complaint to the Interstate Commerce Commission or suit in a federal District or Circuit Court to enforce liability against an interstate carrier, the commission and the federal courts have exclusive authority of all claims for overcharges on interstate shipments, whether [fol. 73] they grow out of an excessive rate or out of misrouting notwithstanding section 2, which provides that nothing in the act shall abridge existing remedies."

Therefore, while we deny that any court, either state or federal, has jurisdiction in this case, it seems clear that even if we were wrong in this, and if there is a remedy in court, the Federal courts have exclusive jurisdiction.

III

No Violation of Section 4 Has Been Shown.

Assuming, for the purpose of this argument, that the court has jurisdiction of this action, it must be dismissed for the reason that respondent has not shown that the collection of the 30¢ rate from Benchland was in violation of the Fourth Section. Section 4 makes it unlawful to "charge or receive" more for a shorter than for a longer haul. All of the evidence is contained in the stipulation found at page 9 et seq. of the Record. There is no evidence that a single shipment of wheat was carried by appellant from Billings to Minneapolis or Duluth on the 28¢ rate published from Billings during the period respondent's shipments moved from Benchland or at any other time. The evidence is merely:

"Seventh. That defendant's *tariff* I. C. C. No. A3720 published and filed with the Interstate Commerce Commission effective Au- [fol. 74] gust 5, 1913, and in effect during all the time herein mentioned, *named* a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana, (Index 100), and *a rate of twenty-eight cents* ($.28) per 100 pounds from *Billings, Montana* (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points." (Italics ours.)

In the absence of evidence that any shipments ever moved from Billings it cannot be said that appellant either "charged" or "received" a greater compensation for a shorter than for a longer haul. This follows not only from a consideration of the meaning of the

words "charged" and "received," but from a consideration of the purpose sought to be accomplished by the fourth section.

The evil aimed at by the Fourth Section is merely a phase of the unjust discrimination and undue prejudice prohibited by Sections 2 and 3. If the rate over the shorter distance is not shown to be unreasonable in itself a shipper is in no way discriminated against or damaged by the mere fact that a lower rate is published for a longer than a shorter haul. In order to be discriminated against respondent's competitors must actually have made shipments on the more favorable rate for the longer distance to respondent's damage. It was undoubtedly for this reason that Congress made the charging or receiving of a higher rate for a shorter than for a longer distance the test of illegality, rather than the mere naming in a tariff of a lower rate for a longer distance, as in our case.

[fol. 75] In the case of Missouri & Kansas Shippers' Association v. M. K. & T. Ry. Co., 12 I. C. C. 483, the Interstate Commerce Commission said with reference to such a situation as we have here:

"Although it is clear that the Class C rate was a paper rate only, so far as hay was concerned, and that the breach by defendant of the provisions of section 4 was therefore purely technical and in no sense substantial, the object of this petition is to take advantage of the situation and to secure reparation on shipments that moved to Kansas City while the defendant inadvertently permitted its tariffs to remain in that condition.

"While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentions proceedings of this kind it ought to examine into the real substance of the matter unembarrassed by considerations that are purely technical. Looking at the complaint from this point of view, it seems to us wholly without merit. We are unable to accept a merely theoretical or paper rate, for the longer haul, that has not been used and was unknown either to the defendant or to the complainant, until casually discovered after it had been the published rate for some years, as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate. This view of the matter is supported by the uncontradicted evidence of the defendant, tending to show that the class C rate of 10 cents to St. Joseph was not a compensatory rate on hay, and by the complete failure of the complainant to show [fol. 76] that the rate to Kansas City was in itself excessive. That issue although raised in the complaint was abandoned on the hearing."

IV

To recover for a violation of the fourth section respondent must prove that it was damaged.

The purpose and effect of the long and short haul clause of the Fourth Section will be understood more clearly after a consideration

of Sections 1, 2 and 3. These four sections determine the character and quality of rates which carriers are allowed to charge. Section 1 provides "that all charges shall be just and reasonable." As construed by the decisions, this means reasonable per se, that is, in and of themselves and without relation to or comparison with other rates. In other words, to be in accord with the first section, rates must not be out of proportion to the expense to the carrier performing the service. There must not be an undue profit to the carrier. The rates must not be exorbitant, nor more than the service is actually worth. If a rate is too high in this sense it is unreasonable and, therefore, "unlawful."

The measure of damages in a case where a shipper has paid an unreasonable rate was settled by the United States Supreme Court in the case of Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, 38 Sup. Ct. 186, 62 Law Ed. 451. That was an action to re- [fol. 77] cover reparation because of the collection of a rate which the Interstate Commerce Commission had previously found to be unreasonable in violation of Section 1 of the Act. The court held that where an excessive charge was collected by a carrier "plaintiffs have paid cash out of pocket that should not be required of them, and there is no question as to the amount of the proximate loss" which is the difference between the amount of the excessive rate paid and the reasonable rate. A carrier is entitled to charge only a reasonable rate and when it collects a greater sum the shipper has paid for something he did not receive and is entitled to recover the excess amount paid, it following as a matter of law that he has been damaged to that extent.

A violation of either Section 2, 3 or 4 of the Act presents a different question and a different rule of damages applies. Section 2 provides that a carrier which charges one person a greater or less compensation for any service rendered than it charges any other person for a like and contemporaneous service under substantially similar circumstances and conditions shall be guilty of unjust discrimination, which is prohibited and declared to be unlawful. Section 3 provides that it shall be unlawful to give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. As the Supreme Court said in the case of I. C. C. v. B. & O. R. R. [fol. 78] 145 U. S. 263, 277, "a charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination or an unreasonable preference under Sections 2 and 3." A rate of 10¢ from A to X which is reasonable, may be lawful today, but become unlawful tomorrow because of the publication and collection of an 8¢ rate from B to X, resulting in undue prejudice against a shipper at A or the locality of A; and the following day the 10¢ rate may again become lawful because of the cancellation of the lower rate from B. Again, the 10¢ rate from A to X may be lawful today and unlawful tomorrow because of the establishment and collection of an 8¢ rate from A to X on a competing commodity, or because of the publica-

tion of an 8¢ rate on the same commodity applicable from A to X when made by a particular shipper. In other words, a rate may be inherently reasonable so that a shipper has not paid an excessive charge and has paid no more than the service is worth to him, but because of the carrier's act in establishing other rates the shipper who pays only the per se reasonable rate is injured for the reason that those other rates result in an unjust discrimination or undue prejudice in violation of Sections 2 or 3. The difference between Section 1 on the one hand and Sections 2 and 3 on the other is that a rate unlawful under Section 1 is unlawful without reference to or comparison with any other rate. It is bad because it is too high in and of itself, whereas rates can only be unlawful under Sections 2 [fol. 79] and 3 by comparison with some other rates.

The respondent's claim is that it can recover here merely by showing that the appellant collected an "unlawful" rate. It is apparent from what we have just been saying that the rate may be "unlawful" under the Act in two very different senses. We now desire to point out that the "unlawfulness" under Section 4 is of the second kind; that is, it is due, not to any inherent vice in the rate itself, but is due to and dependent upon some other rate. In other words, Section 4 is similar in its nature to Sections 2 and 3 and not to Section 1.

A published rate of 30¢ from Benchland (which the court must presume reasonable until declared otherwise by the Commission) is not unlawful if the rate from the more distant point of Billings, for instance, is also 30¢ or more, but in view of the Fourth Section, becomes unlawful only when through an act of the carrier the Billings rate is reduced below 30¢. A shipper from Benchland who pays the 30¢ rate today when 28¢ is the rate from Billings in violation of the Fourth Section, is no more injured by reason of the 28¢ rate from Billings than he was yesterday when he paid the same 30¢ from Benchland which was lawful because the rate from Billings was 30¢ or more, except under one condition. The only possible condition under which respondent could be injured by reason of paying the 30¢ rate from Benchland on the day when the rate from Billings was 28¢ would be where another shipper actually made [fol. 80] shipments from Billings on the 28¢ rate under circumstances that resulted in pecuniary damage to respondent in the way of business losses or shrinkage of profits, since in both cases he has paid no more than an inherently reasonable rate. The existence of a lower rate from Billings is a thing of utter inconsequence to the shipper from Benchland, save and except under one contingency, viz.: when another person makes shipments from Billings under the more favorable rate resulting in pecuniary damage to the shipper from Benchland.

The difference between these two kinds of unlawfulness, one of which is inherent in the rate itself, and the other of which depends upon a comparison with some other rate, has been recognized by the courts. In considering questions of recovery of resulting damage, we have seen that in the Darnell-Taenzer case, supra, the Supreme Court of the United States held that, in a case of inherent

unlawfulness under Section 1, the mere fact that the shipper had paid more than a reasonable amount would entitle him to recover the excess, even though he had passed it on to the consumer and had not in fact suffered the loss himself. Mere unlawfulness, of the kind arising under Section 1, is sufficient to justify recovery, without any proof of damage. But when the question of the rule of damage to be applied in a discrimination or undue prejudice case came before the Supreme Court, it declared that the rule of the Darnell-Taenzer case was inapplicable, since a discrimination may exist without injury to or effect upon the shipper until another [fol. 81] shipper actually makes a shipment on the more favorable rate and thereby obtains an advantage; that the existence of such a situation must be proved affirmatively by a plaintiff; and that the law will not presume damage merely from a showing of discrimination or undue prejudice. This principle was established by the United States Supreme Court in the case of Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 Law Ed. 1446. That was a case where plaintiff made shipments over defendant's line, paying the tariff rate, and subsequently sued the defendant, claiming that the rate was discriminatory and asking for the difference between the rate paid by it and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination. The court says at page 197 that although this action was brought to enforce a cause of action given by Section 8 of the Act, providing that any carrier doing any act prohibited by the statute should be "liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation," plaintiff did not allege or prove that it suffered any damage. Plaintiff contended that this was unnecessary, that the excess over rates paid by others was unlawfully collected, and that, as a matter of law, it was entitled to recover as damages the same rate per ton on all of its shipments as had been rebated any other person on any of his ton- [fol. 82] nage shipped at the same time over the same route. The court refused to so hold, saying:

"3. There were many provisions in the statute for imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government."

* * * * * * *

"The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be

the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fees.' In view of this language it becomes necessary to inquire what the evidence shows was the injury in- [fol. 83] flicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899."

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"There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small."

* * * * * * *

"The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of [fol. 84] damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.

"This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed."

* * * * * * *

"In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that 'to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers.'"

The same rule requiring affirmative proof of damage has been adopted by the Federal courts in cases where other phases of discrimination and undue prejudice were under consideration:

Lehigh Valley R. Co. vs. American Hay Co., 219 Fed. 539 (C. C. A.). This was an action to recover damages for a discrimination by the defendant railroad company in that certain free reconsigning privileges were accorded by the tariff to plaintiff's competitors at one station which were not accorded to plaintiff at his station, plaintiff being required to pay the tariff rate of $2.00 per car not exacted from his competitors in connection with similar shipments. Both the charge to plaintiff and the free service to its competitors [fol. 85] were provided for by the tariffs. With reference to defendant's contention that plaintiff could not recover unless it proved that it was damaged, the court said that it was not enough to show that the plaintiff paid defendant $2.00 per car for the reconsigning service:

"for aught that appears the persons to whom it sold may have themselves paid all those charges, or some of them, or some part of each charge. Just how the initial payment of each $2 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the Hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict."

Homestead Co. v. Des Moines Electric Co., 248 Fed. 439 (C. C. A.). This was an action to recover damages for discrimination resulting from collecting lesser charges from plaintiff's competitors for a contemporaneous service rendered under substantially similar circumstances. The court says at page 442:

"Unjust discrimination will not sustain an action against a public service corporation, in favor of the injured competitor, for the difference between the amount he paid and the amount he would have paid if he had paid at the same rate as his competitor similarly situated for like service, as for money had and received, or any other action at law, except an action in tort for his damages. [fol. 86] Nor is such difference the measure of his damages. They may be the same as, or more or less than, such difference, and they must be pleaded and proved before they may be recovered. Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184."

Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., 148 Fed. 968 (C. C. A.). Plaintiff sought to recover damages because of the collection by defendant of a tariff charge which plaintiff contended was unlawful because expressly prohibited by the Interstate Commerce Act. After stating that this action was brought under the eighth section of the Interstate Commerce Act and quoting that section, the court says:

"To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates in the schedules that will give to a shipper a cause of action for damages. He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him. The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damages."

* * * * * * *

[fol. 87] "The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery."

It is clear from the above authorities that even though a rate is unlawful under Section 2 or 3, there can be no recovery of the unlawfulness excess, without proof of actual damages sustained by the shipper. Mere proof of payment of an unlawful excess is not sufficient under Sections 2 and 3. We have seen above that the unlawfulness under Section 4 is of the same nature as that under Sections 2 and 3, in that it is dependent upon a comparison with some other rate, and that it is unlike the unlawfulness under Section 1, which is inherent in the rate itself. It would seem to follow on principle that there should be no recovery under Section 4 upon mere proof of unlawfulness, unless the shipper can go farther and prove that he has sustained damage; and this in fact has been the ruling of the Commission in many well considered decisions.

We will content ourselves with citing only decisions of the Commission involving demands for reparation based on violations of the Fourth Section:

[fol. 88] Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719. In this case complainant asked reparation, alleging that the rates paid on watermelons shipped from California to Oregon were unreasonable, unjustly discriminatory and violative of the long and short haul clause of the Fourth Section. The commission specifically found that the rates complained of were not unreasonable in violation of Section 1, and not violative of either Sections 2 or 3, but found violations of the Fourth Section not protected by Fourth Section applications. The Commission denied reparation for violation of the Fourth Section upon the ground that plaintiff had not

proved that it was damaged thereby. At page 722 the Commission says:

"It has frequently been held that nothing in the act to regulate commerce warrants a presumption of damage. The distinction is plain between the carrier's unlawful act, which might render it liable to prosecution, and the shipper's right to damages for the injury, if any, occasioned thereby.

"In the absence of proof of damage to the shipper the fact that carriers have charged or received rates which violate the long and short haul rule of the fourth section of the act is not of itself a sufficient basis for an award of reparation. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184; Nix & Co. v. S. Ry. Co., 31 I. C. C., 145, 149; Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C., 146; La Crosse Shippers' Asso. v. C. I. & L. Ry. Co., 43 I. C. C. 520, 524; United States Glue Co. v. C. & N. W. Ry Co., docket No. 6832, unreported."

[fol. 89] Iten Biscuit Co. v. C. B. & Q. R. R. Co. et al., 53 I. C. C. 729. This was also a case where a shipper sought reparation, basing his claim on a violation of the Fourth Section. We desire to call particular attention to the Commission's language in this case, which we quote at length:

"With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful per se, and the excessive charges must as a matter of law be refunded.

"Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury occasioned thereby. The original bill for an act to regulate commerce, which passed the Senate May 12, 1886, proposed, under Section 2, among other things, that a carrier violating the provisions thereof should be liable to respond in damages to the extent of the difference between the rate paid and the lowest rate charged upon like shipments; in section 3, after declaring unlawful any undue or unreasonable preference or advantage, it propesd to establish a cause of action in damages for violation of its provisions, but did not fix the measure of damages; and in section 4 the carrier was to be made liable to the person or persons against whom any excessive charges were made for all damages occasioned by a violation of the provisions thereof. But, as enacted, sections 2, 3 and 4 were amended by striking out the [fol. 90] clauses giving right of action for damages, and section 8 was substituted as a general section covering the omitted clauses of the three sections. In commenting on this omission the Supreme Court in Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 said at page 198:

" 'The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against

the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee, to support the present argument that Sec. 8 means the same thing as the omitted clause. * * * Section 2 of the original Senate Bill said nothing about damages, but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Sec. 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for damages and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.'

"In discussing in this case the civil side of the act, the court said:

"'On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Rail-[fol. 91] way, 167 U. S. 447, 460, construing this section (8), "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government.'

"While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S., 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than it should justly have been required for the service performed. As we find was the fact in the present instance the higher rate may [fol. 92] have been reasonable per se and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and con-

sequent damage. In this instance as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pac. Co. v. Darnell-Taenzer Co., supra, may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the court was 'whether the fact that the plaintiffs were able to pass on the damage they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3 there must be proof of damage and under section 4 the departure [fol. 93] therefrom is of itself proof of damage.

"We affirm our previous conclusion, and hold that in the absence of proof of the fact and amount of damage to complainant an unauthorized departure from the long and short haul rule of the fourth section of the act does not entitle complainant to an award of reparation."

Besides the four or five cases cited above in the Oregon Fruit Company opinion a similar decision was reached in the case of S. J. Greenbaum Co. v. Southern R. Co., 38 I. C. C. 715, at page 718, and was reaffirmed by unanimous decision in Illinois Brick Co. v. Director General, et al., 57 I. C. C. 320, at top of page 323. There had been dissents in some of the previous cases, but the majority opinions, and finally the entire Commission, have been consistently to the effect that the shipper cannot recover the excess payment under the Fourth Section by merely showing that he made the payment, but that he must go farther and prove that he was damaged by the fact that a lower rate was in force from the more distant point.

The respondent upon the hearing below referred to certain decisions of the Commission in which there have been Fourth Section violations and in which reparation was allowed, but they are all cases in which the rate was regarded as a violation of Section 1 as well as of Section 4. In some of these cases the lower rate for the longer distance had been established by the Commission in some [fol. 94] previous decision as the maximum reasonable rate for that distance. It followed necessarily that a higher rate for a shorter distance would be unreasonable in violation of Section 1 as well as unlawful in violation of Section 4, and in these cases reparation is allowed upon the former ground.

There are other cases in which the carrier had been maintaining

the higher intermediate rate through oversight and upon the discovery of the mistake had voluntarily reduced it, thus recognizing its unreasonableness, and in such cases also reparation is allowed by the Commission. But there is not a single decision allowing reparation without proof of damage in any case like the present one, where the lower rate for the longer distance was voluntarily established without order of the Commision and where, upon discovery of the violation, the higher intermediate rate was continued in force and the violation removed by raising the lower and longer rate. In such cases the decisions have been uniform to the effect that reparation will not be allowed without proof of damage.

Upon the hearing below, the respondent also cited a number of state court decisions and one or two Federal court decisions allowing recovery of reparation without proof of damage, but these decisions are all based upon state statutes and not upon the Fourth Section of the Interstate Commerce Act. All but one or two of these decisions were rendered before the decisions of the Supreme Court in the International Coal Company case, supra, and before the decisions of [fol. 95] the Commission in the Oregon Fruit Company and Iten Biscuit Company cases. It is true that some of the state statutes are identical in wording with the Federal statutes. It is clear, however, that on intrastate business a state court can construe a state statute as it sees fit and regardless of any contrary construction of a similar Federal statute. These courts chose to adopt the theory advanced by the plaintiff in the International Coal Company case and rejected by the court in that case, that mere proof of an unlawful excess payment, even though the unlawfulness arose from comparison with another rate, was sufficient to permit a recovery without proof of damage. This theory has been discarded by the United States Supreme Court and by the Interstate Commerce Commission, and we submit that it is entitled to no weight here.

It seems clear then:

1. That this action is outlawed under the two-year provision of the Interstate Commerce Act and under the decision in Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, supra;

2. That even if the action had been commenced within the two-year period, it could not be sustained in this court, for the reason that no court has jurisdiction either to pass upon the lawfulness or unlawfulness of the rate collected, or to determine what would be a lawful rate, and for the further reason that if this were a court matter at all, it is necessarily and specifically based upon a violation of the [fol. 96] statute, and in such cases where courts have jurisdiction that jurisdiction is confined to the Federal courts;

3. That there is no actual violation of Section 4 shown because it is not shown that the appellant actually "charged" or "received" the lower rate for the longer distance; and

4. Because, even where a violation of the Fourth Section is shown and the action is brought within the proper time and before the

proper tribunal, no reparation is recoverable without proof that the plaintiff has actually suffered damage by reason of the publication of the lower rate for the longer distance.

It seems clear that this action must be dismissed for any one of the four reasons assigned by appellant. We respectfully submit that the judgment of the lower court should be reversed and the action dismissed.

Respectfully submitted, Hoke, Krause & Faegre, F. G. Dorety, R. J. Hagman, Attorneys for Appellant.

[fol. 97] STATE OF MINNESOTA:

SUPREME COURT

[Title omitted]

ORDER ENLARGING TIME

Ordered, that the time within which the printed Respondent brief must be served and filed herein, to comply with rule VIII of this court, be and it is extended to include October 26th, 1922.

Dated October 6th, 1922.

Calvin L. Brown, Chief Justice.

[fol. 98] STATE OF MINNESOTA, ss:

SUPREME COURT

[Title omitted]

BILL FOR COSTS—Filed Dec. 29, 1922

Costs and Disbursements

Statutory costs	$25.00
Printing Record	.....
Printing Brief	34.92
Clerk District Court for making return ($5.00)	.....
Clerk Supreme Court for filing return ($10.00)	.....
..... Affidavits (25 cents each)	.25
Postage and Express	.....
Transcript of case used only for appeal to Supreme Court, and not used in motion for a new trial	.....
Premium on appeal bond	.....
.....	.....
The above bill of costs and disbursements taxed and allowed Dec. 29th, 1922, at	$60.17

H. Mueller, Clerk Supreme Court of Minnesota, By P. O. Scow, Deputy. (Supreme Court Seal.)

STATE OF MINNESOTA,
County of Hennepin, ss:

W. W. Patterson, being first duly sworn, deposes and says, that he is one of the Attorneys for the respondent in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said respondent in the above entitled proceeding, and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said respondent.

W. W. Patterson.

Subscribed and sworn to before me, this 26th day of December, 1922. Lasetta Maddaus, Notary Public, Hennepin County, Minn. (Notarial Seal.) My commission expires 11/1, 1925.

SIR:

Please take notice. That the costs and disbursements of the respondent in the above entitled action will be taxed by and before Herman Mueller, Clerk of the Supreme Court of Minnesota, at his office in the Capitol, at St. Paul, Minnesota, on Friday, the 29th day of December, 1922, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said respondent and inserted in a judgment in said action that will then and there be entered.

Very respectfully, Devaney & Edwards, W. W. Patterson, Attorneys for Respondent, 1132–56 Builders Exchange, Minneapolis, Minnesota. To F. G. Doherty, R. J. Hagman, Hoke, Krause & Fagre, Attorneys for Appellant.

[fol. 99] [File endorsement omitted.]

[fol. 100] IN THE SUPREME COURT OF MINNESOTA

370—5/22

[Title omitted.]

OPINION, HOLT, J.—Filed Dec 15, 1922

Syllabus

Section 4 of the Interstate Commerce Act declares a published tariff of a carrier unlawful which charges more for a shorter haul than for a longer, the shorter haul being a part of the line or route of the longer, therefore, the maximum rate that can be collected by the carrier for the shorter haul would be the established tariff for the longer haul, and what is received in excess thereof may be recovered in an action as for money had and received for the shipper's use.

In such an action it is not necessary to show shipments over the longer haul upon which charges were paid as per the published tariff.

Nor need damages be proven except that the charges collected by the carrier exceeded the published tariff for the longer haul.

Of such an action a state court has jurisdiction.

Affirmed.

Opinion

The main facts are these: Between Aug. 23, 1913, and Sept. 3, 1914, plaintiff shipped over the line of defendant, a common carrier, 37 cars of wheat from Benchland, Montana, to Minneapolis and Duluth, Minn. During that period defendant's published tariff rate for transporting wheat was 30 cents per cwt. from Benchland to the [fol. 101] destinations mentioned, and 28 cents per cwt. from Billings to the same destination points, although the haul is 152 miles longer from Billings than from Benchland, which is an intermediate point on defendant's line of railway running from Billings to Minneapolis or Duluth. Plaintiff accordingly paid 2 cents per cwt. more for the shorter haul than for the longer, or in all $590.26 more than if defendant had carried the wheat from Billings 152 miles farther. Plaintiff sued for this as being a payment in excess of the lawful rate and recovered. Defendant appeals from the judgment.

Plaintiff predicates the right of recovery upon §4 of the Interstate Commerce Act, which so far as pertinent to this appeal reads: "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance."

Plaintiff's theory is that the maximum rate for the shorter haul is under said section — the published tariff for the longer haul, since the law declares the published higher tariff for the shorter haul unlawful. Defendant's contention is that under the Act the published tariff being unlawful, because greater for the shorter haul than for the longer, there was no legal rate from Benchland, hence redress [fol. 102] may be had only through the Interstate Commerce Commission, which must first determine what would have been a lawful and reasonable rate, and then order reparation if defendant had received more. If the amount collected was no more than reasonable, plaintiff was not damaged unless injured by the discrimination in favor of competitors shipping from Billings. If this contention be sound it would follow that the court had no jurisdiction, for no application has been made to the commission for relief and, when this action was begun, the time to present the claim to the Commission had expired (§16 of the Act).

Respondent concedes that the rulings of the Interstate Commerce Commission is in harmony with the contentions of appellant. Oregon Fruit Co. v. Southern Pacific R. R. Co. 50 I. C. C. 719 and Iten Biscuit Co. vs. Chicago Burlington & Quincy Ry. Co. 53 I. C. C. 729 are the most recent decisions on the subject. The logic of the conclusion may be somewhat weakened by Ryan Fruit Co. v. Director General 60 I. C. C. 733, where the shippers were allowed a refund without any proof of damages other than the mere fact that the carrier had violated §4 by charging a greater compensation for a through rate than the aggregate of the intermediate rates. However, the Federal Circuit Court of Appeals for the 9th district has reached a conclusion at variance with that of the Interstate Commerce Commission and which appeals to this court as right. The holding on the point under consideration is thus expressed by that court in the syllabus in Davis v. Parrington 281 Fed. 19; "The collection by a carrier of a rate in excess of the rate charged by it for a longer haul over the same route, without the permission of the Commission first having been obtained, is the collection of an illegal rate, and the excess of such rate over the rate for the longer haul may be recovered by an action in the court without resorting first to proceedings before the Interstate Commerce Commission, since the [fol. 103] court exists under Interstate Commerce Act §89". In this question is clearly not administrative, and the remedy by action in instance there was no permission from the Commission to charge a higher rate from Benchland than from Billings. The case also holds that the two year limitation contained in §16 of the Act does not apply where a suit at law lies without any action first being taken by the Commission. In such a suit the limitation statutes of the state determine whether or not the claim is barred.

When a carrier undertakes to establish a greater rate or tariff for a certain haul than a statute permits, and such statute also fixes the carrier's published tariff for a longer haul as the maximum for that certain shorter haul, the excess collected over such maximum should be held as an overcharge, recoverable in an ordinary action at law as money had and received for the use of plaintiff. In the determination of such an issue the court has no occasion to pass upon the lawfulness or reasonableness of the rate collected for the statute has determined that. This position is fortified by decisions based upon provisions in state statutes and constitutions similar to those in §4 of the Interstate Commerce Act. California Adjustment Co. v. Southern Pac. R. R. Co. 237 Fed. 954, (on certiorari dismissed in 248 U. S. 593); Louisville & Nashville R. R. Co. v. Walker 110 Ky. 961; California Adjustment Co. v. Atkinson, Topeka & S. F. R. R. 179 Cal. 140; McGrew Coal Co. v. Missouri Pac. R. R. Co. 280 Mo. 466 (affirmed in 256 U. S. 134).

These authorities also dispose of defendant's contention that it must be shown that the carrier actually charged or received the lower rate for the longer haul, holding, in effect, that the published lower tariff for the longer haul does so show.

The same may be said of the proposition that no recovery can be [fol. 104] had without proof of actual damages. Under the Par-

rington case, and the other court decisions above cited, the unlawful published rate for the shorter haul put in operation the published rate for the longer haul, and to the extent that more was collected from the shipper that much, at least, was his damage. It was that much money wrongfully taken out of his purse.

Another point made by defendant is that the state courts have no jurisdiction of cases predicated upon violation of the Interstate Commerce Act, §9 thereof expressly confining such jurisdiction to the Commission and the federal courts. That is true as to damages when the amount thereof has to be determined from facts other than simply collecting more than the lawful published tariff. But §22 of the Act provides: "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". This would seem to authorize an action in a state court to recover the amount exacted above the charge permitted by §4 for the longer haul.

The writer would be content to follow the decisions of the Interstate Commerce Commission in the absence of a determination by the Supreme Court of the United States, the final authority. The construction placed upon the Act by the Commission results in a more equal and uniform treatment of shippers and carriers, and subjects all claims arising out of a violation of the act to the same limitation.

The judgment is affirmed.

[fol. 105] STATE OF MINNESOTA:

SUPREME COURT

[Title omitted]

JUDGMENT—Filed Dec. 29, 1922

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment, of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin, be and the same hereby is in all things Affirmed.

And it is further determined and adjudged that Respondent, herein, do have and recover of Appellant, herein the sum and amount of Sixty and 17/100 Dollars, ($60.17) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Dec. 29th, A. D. 1922.

By the Court.

Attest: Herman Mueller, Clerk.

Statement for Judgment

Statutory Costs	$25.00
Printer	34.92
Clerk	.....
Acknowledgments	.25
Return	.....
Postage and Express	.....
Filing Mandate	.....
Transcript	.....
Appeal Bond	.....
Total	$60.17

[fol. 106] STATE OF MINNESOTA, ss:

SUPREME COURT

Herman Mueller of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul Dec. 29, A. D. 1922.

Herman Mueller, Clerk. By Peter O. Scow, Deputy. (Seal of Supreme Court, State of Minnesota.)

[File endorsement omitted.]

[fol. 107] STATE OF MINNESOTA:

IN SUPREME COURT

No. 23141

[Title omitted]

CLERK'S CERTIFICATE

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, and custodian of the records thereof, do hereby certify to the Honorable Supreme Court of the United States of America that the foregoing Record, Appellant's Brief, Order extending respondent's time to serve and file briefs, Affidavit and Notice of taxation of costs, opinion, and final Judgment entered, are full, true and correct copies of the originals thereof on file and of record in my office; and constitute the entire transcript of record of the above

entitled case, including all of the proceedings had in the Supreme Court of the State of Minnesota and including appellant Great Northern Railway Company's brief filed in the Supreme Court of the State of Minnesota.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at St. Paul, Minnesota, this 12th day of January, 1923.

Grace F. Kaercher, Clerk Supreme Court, State of Minnesota.
(Seal of Supreme Court, State of Minnesota.)

[fol. 108] STATE OF MINNESOTA,
County of Hennepin:

DISTRICT COURT, FOURTH JUDICIAL DISTRICT

[Title omitted]

CLERK'S CERTIFICATE

I, Walter A. Ryberg, Clerk of the above entitled Court and custodian of the records thereof, do hereby certify to the Honorable Supreme Court of the United States of America that the summons and complaint in the above entitled action, brought to recover Five Hundred Ninety and 26/100 Dollars ($590.26) with interest, was filed on the 25th day of September, 1919; and that no return of the service of the said summons or complaint on the defendant was filed or is of record in my office; and that the records of this office do not indicate whether or not the said summons and complaint were ever served on defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Minneapolis, Minnesota, this 12th day of January, 1923.

Walter A. Ryberg, Clerk District Court of the Fourth Judicial District of the State of Minnesota, County of Hennepin. [Seal of District Court, Hennepin Co., Minn.]

[fol. 109] IN THE SUPREME COURT OF THE STATE OF MINNESOTA

[Title omitted]

WRIT OF CERTIORARI AND RETURN—Filed Aug. 10, 1923

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the transcript of the record of the proceedings in this court in the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this court.

In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States and directed to the Supreme Court of the State of Minnesota, dated March 12th, 1923, I now hereby certify that on the 31st day of March, 1923, there was filed in my office a stipulation in the above entitled cause in the following words towit:

[fol. 110] STATE OF MINNESOTA:

MINNESOTA SUPREME COURT

[Title omitted]

STIPULATION—Filed Nov. 31, 1923

The Supreme Court of the United States having on the 12th day of March, 1923, issued a writ of certiorari in the above entitled proceeding, directed to the Supreme Court of the State of Minnesota, which said writ has been filed with the Clerk of the Supreme Court of the state of Minnesota.

It is hereby stipulated and agreed, by and between the parties herein, by their respective counsel, that the transcript of record which was heretofore certified by the Clerk of the Supreme Court of the State of Minnesota and which appellant Great Northern Railway Company filed with the Clerk of the Supreme Court of the United States at the time of filing its application for a writ of certiorari, shall be taken and considered as a return to the said writ of certiorari and a compliance with the said writ of certiorari requiring that the Supreme Court of the state of Minnesota send to the Supreme Court of the United States the record and proceedings in said cause.

Dated this 27th day of March, 1923.

Frederick M. Miner, Devaney & Edwards, John P. Devaney, De Witt Clinton Edwards, Walter W. Patterson, Attorneys for Respondent. F. G. Dorety, R. J. Hagman, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 111] I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness, My official signature and the seal of the said Supreme Court of the State of Minnesota at the City of St. Paul, in said State of Minnesota this 7th day of August, 1923.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 112] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Being informed that there is now pending before you a suit in which Great Northern Railway Company is appellant, and McCaull-Dinsmore Company is respondent, No. 23141, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court for the County of Hennepin, Fourth Judicial District, of the State of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that [fol. 113] you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 114] [File endorsements omitted.]

JAN 17 19
WM. R. STANS

No. 209.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

v.

McCAULL-DINSMORE COMPANY.

UPON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DIRECTOR GENERAL OF RAILROADS AS AMICUS CURIAE.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Director General.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GREAT NORTHERN RAILWAY COMPANY, petitioner, *v.* McCAULL-DINSMORE COMPANY. } No. 209.

UPON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DIRECTOR GENERAL OF RAILROADS AS AMICUS CURIÆ.

STATEMENT.

The Court has already granted the Director General permission to file a brief in this case as *amicus curiæ*. The object of filing this brief is to assist the Court in arriving at a correct construction of the law with regard to certain phases of the Fourth Section of the Act to Regulate Commerce. This is a very important question to the Director General because there are numerous cases involving similar questions pending against him in the lower courts and also two cases before this court which it is understood will be argued simultaneously with this case, namely, *Davis* v. *Parrington*, No. 123, October Term, 1923, and *Davis* v. *Portland Seed Company*, No. 114, October Term, 1923.

For the purpose of this brief it will be assumed that the application filed by the Great Northern Railway Company, page 15 of the transcript, did not protect the particular departure from the Fourth Section involved in this case in *Railroad Commissioners of Montana* v. *B. A. & P. Ry.*, 31 I. C. C. 641, cited at page 16 of the transcript. In other words, the argument is based upon the theory that the departures from the Fourth Section of the Act were not protected by application or order of the Commission. The brief will deal primarily with two questions, first, what constitutes a violation of the Fourth Section of the Act, and, second, what constitutes damage where there is a violation of the Fourth Section.

The shipments in this case moved from Benchland, Montana, to Minneapolis and Duluth, Minnesota, in 1913 and 1914. The rate charged was higher than the rate published from Billings, Montana, a more distant point than Benchland, Benchland being between Billings and Minneapolis and Duluth, and the route from Billings to those destinations was through Benchland. (Tr. p. 13.)

As this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth

section as a whole, and of its interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole, a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as apparent from the various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other, but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause, and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, be discussed.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the respondent (hereinafter referred to as the plaintiff), and the theory of the lower courts is that the rate legally

from Benchland, Mont., to Minneapolis and Duluth, Minn., and the rate which the carrier, therefore should have collected was not the higher rate actually published in the tariffs from Benchland to Minneapolis and Duluth, but was the lower rate published in the tariffs from Billings, Mont., the more distant point, to Minneapolis and Duluth. In other words, it is the plaintiff's contention, and the theory of the lower courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section of the tariffs, the higher rate actually published from Benchland to Minneapolis and Duluth becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from Billings to Minneapolis and Duluth, though not actually published in the tariffs to apply from Benchland, must, in effect, be treated as actually published to that point and to be the only legally published rate from Benchland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published from Benchland to Minneapolis and Duluth was a straight overcharge above what is contended to be the only legally published rate, the lower rate from Benchland to Minneapolis and Duluth, though this latter rate was never actually published from Benchland.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct con-

flict with what would seem to be the conclusions necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected and retained.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument what he contends to be the correct construction of the fourth section with reference to damages, before attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of

the Commission. For convenience the fourth section has been appended in full to this brief.[3]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as follows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because greater than an existing combination, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

> (a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

[3] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate from or to (as the case may be) the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to

the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or

any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the petitioner (hereinafter called the defendant) to rebut what might otherwise be contended, that the rate from Benchland for the shorter distance was prima facie unreasonable because of the lower rate for the longer distance from Billings.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate from Benchland, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both

[4] For the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the petitioner attacks the jurisdiction of the court in this respect.

questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the lower courts, that the higher rate actually published from Benchland, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from Billings, though not actually published in the tariffs to apply from Benchland, must, in effect, be treated as actually published from that point, and to be the only legally published rate from Benchland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrate the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by the mere *publication* of a rate, but forbids, and is violated only by the *actual charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from Benchland to Minneapolis and Duluth to be read out of the tariffs, there is not provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section, which will warrant *reading into the tariffs* the lower rate published solely from Billings to Minneapolis and Duluth, so as to treat it as if actually published from Benchland to Minneapolis and Duluth. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute

> binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.
>
> In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the higher rate actually published from Benchland to Minneapolis and Duluth out of the tariffs, and to permit the carriers to charge between those points the lower rate actually published only from Billings to Minneapolis and Duluth, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for

> such transportation of * * * property * * * between the points named in such tariffs *than the rates*, fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified*,

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from Benchland, and to charge only the lower rate actually published from Billings, is afforded if the Director General be

correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate from Benchland could be ignored, since so far as this record goes there is nothing to show that there had been any actual movement from Billings to Minneapolis and Duluth and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications

for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation resting upon the carrier to collect the published rate, even though it violates the fourth section.

The following language from the case of *United States* v. *Louisville & Nashville R. R.*, *supra*, is sometimes quoted in support of the theory which plaintiff advances here:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on applica-

> tion made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases*, 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.) (Italics added.)

The context in which this language was used, however, must not be overlooked. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above clearly implies the Court's recognition of the

fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, nevertheless, to continue in force until changed as provided by law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on

section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand, the *Piper case* might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from Benchland to Minneapolis and Duluth violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the shipper, although the form of the bill of lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused

> by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is

nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published from Benchland to Minneapolis and Duluth and read into the tariff the rate actually published only from Billings to those destinations without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*, consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not

only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the

amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

> the act; and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.
>
> * * * * *
>
> *This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law, but with the only construction which will preserve the chief function of section 6,* which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the de-

cision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 10.) It will suffice to say here that the right of a court to award damages for

violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-

of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. Reference to the Congressional Debates in connection with the amendment of the fourth section in 1910 will show what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point and by taking constructive possession of a shipment and rebilling it to its ultimate destination, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of

Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped, at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show

that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in

the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of that section[6] and that where such relief is granted

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause have frequently been expressed.

Chairman Mann, of the Interstate Commerce Committee of the House, expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation to authorize a company to charge less for the long haul than they do for the short haul." (Pp. 4579, 4580, Congressional Record, April 12, 1910.)

It will be noted that the first sentence above quoted applied to both clauses of the fourth section, while the second sentence refers specifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation

of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The record in this case fails to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published from Billings, was ever actually charged and received. As there was no actual departure from the long-and-short-haul clause, there was no necessity for relief, and hence it is immaterial whether or not the application (tr. p. 15) covered this situation.

A consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of

damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates, even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R. Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points*

cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Anaconda Copper* cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage

in La. & Tex., 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

> reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court

to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate charged for the longer distance, and that this presumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended

in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under all circumstances be collected. On the one hand, therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section

4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial, is to give no effect whatever to the express declaration of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater

civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what constitutes violation under the aggregate-of-intermediates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate

from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does not consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-short-haul clause does not make the charging of the lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have

had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the violation can not be avoided except by charging the same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as

to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of damage must be the difference between the higher published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies

a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under sections 1, 2, or 3 had the aggregate-of-intermediates clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of

intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable

rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the presumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there

would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable 80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar cir-

cumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections

can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act.

It is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that the shippers have protection against the charging of a higher rate for a shorter distance, or of a higher through rate than the aggre-

gate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 3 to 11 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 8 to 11. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual

violation of the long-and-short-haul clause, because of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because

greater than an existing combination, but that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the

difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since he neither proved nor attempted to prove that any shipments ever moved from Billings upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not

purport to cover any incidental damages for violations of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

The Director General, therefore, submits that this court should reverse the judgment of the Supreme Court of Minnesota.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Director General.

WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

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Supreme Court of the United States.

October Term, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

BRIEF OF RESPONDENT RESISTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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BRIEF OF RESPONDENT RESISTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

THIS IS AN ACTION FOR MONEY HAD AND RECEIVED AND NOT AN ACTION FOR DAMAGES, AND HENCE INVOLVES NO CONSTRUCTION OF INTERSTATE COMMERCE ACT.

The shipments here involved moved over the line of the petitioner from Benchland, Mont., to Minneapolis and Duluth, Minn. For this transportation petitioner charged and collected a rate that was two cents higher than the rate on wheat it then had in force and effect over the same line to these places from a point farther away, namely, Billings, Mont. This action is to recover

for said excess as so much money wrongfully collected on the theory that not more than the Billings rate could be legally charged under Sec. 4 of the Interstate Commerce Act which provides that no greater compensation shall be charged for a shorter than for a longer distance over the same line or route in the same direction. The action is thus one at common law for money had and received, which remedy was not taken away from shippers by this act but was expressly preserved by Sec. 22 thereof which provides:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The gist and limits of the decision of the Minnesota Supreme Court are contained in the following quotation from the opinion:

> "When a carrier undertakes to establish a greater rate or tariff for a certain haul than a statute permits, and such statute also fixes the carrier's published tariff for a longer haul as the maximum for that certain shorter haul, the excess collected over such maximum should be held as an overcharge, recoverable in an ordinary action at law as money had and received for the use of plaintiff. In the determination of such an issue the court has no occasion to pass upon the lawfulness or reasonableness of the rate collected for the statute has determined that. (191 N. W. 42)

The Interstate Commerce Act is involved only to the extent of the following portion of Sec. 4:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of pas-

sengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *."

It is undisputed that the conditions obtaining here bring this case within the above quoted provisions prohibiting a carrier from charging more for a shorter than for a longer haul. Hence the compass of the question here presented is whether, when there is charged a rate for a shorter haul which is higher than the rate that is charged for a longer haul under those conditions, the excess can be collected as an overcharge by virtue of the provision of Sec. 4 that "it shall be unlawful for any common carrier * * * to charge or receive any greater compensation for a shorter than for a longer distance * * *."

This provision is unconditional. The rate that is charged for the shorter distance must not exceed the rate that is charged for the longer distance. It follows that when this provision is violated, the charge for the longer distance must necessarily be less than the charge for the shorter distance. While neither rate, taken by itself, is unlawful, the existence of both makes each unlawful and at least to the extent of their difference. As both rates must be compared to determine the unlawfulness of either and the extent of such unlawfulness, or otherwise a fourth section violation could never be proven, the fact that the Billings rate, a cheaper rate for a longer distance, exists at the same time that the Benchland rate, a higher rate for a shorter distance, exists, and is therefore unlawful, does not militate against a recovery of the differ-

ence between the two rates in this action for money had and received. If the effect of the comparison is to make the unlawfulness of one rate neutralize the unlawfulness of the other, such comparison, which is the sole test for determining when either violates this section and the extent thereof, would make lawful that which is unlawful. The result would be that two wrongs would make a right and a premium would be put upon every fourth section violation.

Sec. 4 establishes a fixed rule of law by which can be determined to what extent a rate is unreasonable. It was in recognition of the fact that it costs no more to haul the same commodity over the same route in the same direction for a shorter than for a longer distance and to stop the common practice of carriers in charging more for a shorter than for a longer distance, that this long and short haul provision was inserted in the law. A rate that is higher for a shorter than for a longer distance is to that extent unreasonable under the fourth section. Sec. 4 imposes a requirement in addition to those of Secs. 1, 2 and 3. If it did not, the Commission, by declaring reasonable, non-discriminatory and nonprejudicial a rate which is higher for a shorter than for a longer distance in violation of Sec. 4, could declare such rate lawful notwithstanding such violation, and this limitation of Sec. 4 would cease to be a limitation. But just as this long and short haul rule is binding upon the courts in the exercise of their judicial powers, it is likewise binding upon the Commission in the exercise of its administrative powers. The Commission cannot make any find-

ing under Secs. 1, 2 or 3 which would make lawful a rate which Sec. 4 makes unlawful. The commission cannot unmake, any more than it can make, the law.

The right of recovery here cannot be affected by any speculation as to whether, upon investigation, the Commission might find the Billings rate, which is used as the basis for figuring this excess, is unreasonable under Sec. 1, or discriminatory under Sec. 2, or prejudicial under Sec. 3. If such speculation could be indulged in, then a carrier would be very much embarrassed in the collection of its freight rates for the shipper could escape payment unless the carrier could show that an investigation had been made by the Commission as to the rate sought to be collected and that in such investigation the Commission had found that such rate did not violate Secs. 1, 2, or 3.

It is true that upon a fourth section violation being called to the attention of the Commission, the Commision might correct it as to future shipments by making an order raising the rate for the longer distance and making it the same as the rate from the intermediate point, but such an order could not be made retroactive. Sec. 6 of the Act expressly provides that a rate cannot be charged for the transportation of a shipment unless it was established prior to the movement of the shipment, but even if the Commission had such power, it would no doubt exercise it by lowering the rate for the shorter distance and making it equal to the rate for the longer distance since the carrier, by establishing the lower rate for the longer distance, has declared that such rate affords reasonable compensation (*Max-*

well v. Wichita Falls, etc. Ry. Co., 20 I. C. C. 197), and it therefore follows that the rate for the shorter distance should be at least not any more as it costs no more to transport commodities for a shorter than for a longer distance over the same route in the same direction.

If this rate had never been paid, petitioner would not contend that its collection could be enforced. This court has held in *U. S. v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, that a carrier can even be enjoined from collecting a rate that violates the fourth section. In the opinion in that case this court said:

> "The right to continue it (a charge prohibited by the long and short haul clause) had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given."

THERE IS NO DIFFICULTY IN APPLICATION OF LONG AND SHORT HAUL CLAUSE IN ITS NATURAL SENSE.

If in bringing an action of this kind the shipper does not figure the excess sought to be recovered on the basis of the cheapest rate for a longer distance that is found in the tariff of the carrier, manifestly the principle underlying the right of recovery is not thereby affected. If in violation of Sec. 4 there is collected from the shipper a rate for a shorter haul that is higher than rates for longer hauls, then regardless of however numerous such cheaper rates for longer hauls may be, the shipper can recover the difference between the rate paid and any one of the cheaper rates for any of the longer hauls.

Whichever of the cheaper rates is used in the process of subtraction to ascertain the amount of the excess paid, the difference so arrived at, as aptly said by the Minnesota Supreme Court in its opinion in this case, is "that much money wrongfully taken out of his (the shipper's) purse," although a greater difference might have been obtained if a different cheaper rate had been used in the calculation.

If upon getting a recovery the shipper finds a rate for a longer distance that is cheaper than the rate he used as a basis in figuring the amount due, he of course would not be permitted to open up his case and by amending his pleading get a recovery by using as a basis for figuring such excess the rate that he discovered after obtaining his judgment, nor could he use such rate as a basis for getting additional recovery in a new action, any more than a person who obtains a judgment on an account, upon finding an error in such account in favor of the debtor, can open up the case and recover the amount as shown by the account after such error has been corrected, or can maintain another action to recover on the account as corrected. When a litigant has had his day in court and has presented his case, the law owes him no duty to permit him to present his case anew where, by reason of his own negligence, he has not so presented his case as to permit him to recover the maximum amount that the actual facts, if presented, would have entitled him to recover.

Where a higher rate is collected for a shorter than for a longer distance, the statute does not make the right to recover the overcharge dependent upon whether the carrier has an undercharge

claim for transporting a shipment for the longer distance for which the cheaper rate is collected. By the single provision that not more shall be collected for a shorter than for a longer distance the carrier is prohibited from collecting more, but if it does, the difference between the rates so collected does not belong to it and should be paid back.

While we are not concerned with the question of whether a carrier has an undercharge claim in the case supposed by petitioner, it may be observed that by virtue of Sec. 6 of the Act providing that a rate must be established before it can be collected and that no greater rate shall be collected than the rate shown in the tariff, it would logically follow that the carrier cannot charge more for the longer haul than the rate the carrier has published for it. That is consistent with the right of the shipper to recover the overcharge here for, under a familiar rule of statutory construction, the general provision of Sec. 6 that no rate shall be collected other than the published rate must give way to the specific provision of Sec. 4 that no higher rate shall be charged for a shorter than for a longer haul. Where the carrier charges less for a longer than for a shorter haul, the carrier could not even enforce the collection of such cheaper rate inasmuch as such rate is unlawful. The situation thus becomes the same as where the carrier has established no rate and the effect is that, under the express provisions of Sec. 6, the carrier is unlawfully engaged in the transportation of property. (*Maxwell v. Wichita Falls, etc. Ry. Co.*, 20 I. C. C. 197)

THE CASES DECIDED BY THE INTERSTATE COMMERCE COMMISSION, WHICH ARE RELIED UPON BY PETITIONER, ARE DISTINGUISHABLE IN THAT THERE THE CLAIMS ARE FOR DAMAGES AND NOT FOR MONEY HAD AND RECEIVED.

These cases, as shown by the *Iten Biscuit Co. case*, are confined to the "shipper's right to damages for any pecuniary injury" resulting from the carrier's violation of the Act. The question decided was what are damages when there has been a violation of the Act. The cases do not involve, as this one here does, a claim for the excess as such paid over and above the maximum charge that could be legally collected. To recover such excess the common law action for money had and received must be instituted and the Commission has no jurisdiction over such a case. Thus the Commission could not have decided, and while its jurisdiction remains the same as it is now, never will decide, the question of the right to recover such excess as excess.

But if it be said that we use the word "damages" in a strained sense in making this distinction, still there is nothing inconsistent between the holding in the *Iten Biscuit Co. case* and the holding of the Minnesota Supreme Court in this case. In the *Iten Biscuit Co. case* the Commission said that where they had found a rate to be unreasonable and claim is made to recover damages on account of having paid such rate, "damage is established by the very circumstances of the case." So here, when the fourth section declares that there shall not be

charged more for a shorter than for a longer haul and it is made to appear that more was charged for a shorter than for a longer haul in that the rate from Benchland, the shorter distance, was more than the rate from Billings, the longer distance, damage to the extent of the difference in these rates is established "by the very circumstances of the case," and as said by this court in *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U. S. 531, "the plaintiffs have paid cash out of their pockets that should not have been required of them and there is no question as to the amount of the proximate loss." The Commission has always recognized the correctness of the decision of this court in the case just cited, and in referring to that case in the *Iten Biscuit Co. case*, the Commission said: "In that case the reparation was awarded for the payment of an unreasonable rate." No valid distinction can be made between the *Darnell-Taenzer Co. case* and the case here. If in the case here the Commission had determined upon investigation that the Benchland rate was unreasonable to the extent of the difference between that rate and the Billings rate, then in recovering such difference it would not be necessary to prove damages under the decisions of this court or of the Commission. It therefore follows that where the same determination is made by the application of the rule of law fixed by the long and short haul clause, it is likewise unnecessary to prove damage to recover such difference. This case proves itself.

NO FEDERAL STATUTE OF LIMITATIONS IS INVOLVED.

The only federal statute of limitations which petitioner claims controls is in the Interstate Commerce Act, but it appears from the portion of Sec. 16 thereof, which petitioner quotes in its brief, and which is all that is relied upon in support of its contention, that this section is confined to the filing of complaints with the Commission for the recovery of damages and to the filing of petitions in courts to enforce orders of the Commission for the payment of money. This action thus does not come within the provisions of this section. This is an action in a state court and recovery is not sought upon any order of the Commission for the payment of money but upon the rule of law established by Sec. 4 as to what shall be the maximum rate for the shipments involved. Hence it logically follows that as this is an action for money had and received, the statute of limitations of Minnesota, where the action was brought, controls. (*Kansas City Southern Ry. Co. v. Wolf*, (C. C. A), 272 Fed. 681) Whatever may be said of the desirability of having a uniform statute of limitations applicable to this kind of an action wherever brought, the remedy must be provided by amending this act. The argument of the petitioner should therefore be presented to Congress and not to this court.

This court has never held that Sec. 16 of the Act applies to an action of this kind. The case of *Phillips v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, the only case relied upon by petitioner, is

readily distinguishable in that in that case recovery was sought upon an order of the Commission for the refunding of money collected by a carrier to the extent the Commission had found the rate charged to be unreasonable.

Distinguishing the *Phillips case,* the Circuit Court of Appeals for the Ninth Circuit, in the case of *Davis, Agent, v. Parrington,* 281 Fed. 10, after pointing out that the *Phillips case* belonged to the class of cases which had to be instituted primarily before the Commission, said:

> "Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court, based upon the finding of the Commission in the other proceeding. The court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court, and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act."

If this statute does not apply to an action for the recovery of damages for a fourth section violation where the right of recovery is not based upon an order of the Commission, *a fortiori* the statute does not apply to an action for money had and received to recover what has been collected in excess

of the maximum charge that could be legally made. In effect this is an action to recover an overcharge, and just as state statutes of limitation unquestionably apply to actions on overcharge claims, so such state statutes of limitation should apply to actions of this kind. Otherwise, we submit, this court would not have sustained a recovery in either of the cases of *Penn. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 122, or *Penn. R. R. Co. v. Sonman*, 242 U. S. 121. According to the petitioner, the limitation provided by Sec. 16 not only bars the remedy but destroys the liability, and yet in the first of the two cases just cited this court allowed a recovery on claims originating in 1902, although the action was not commenced until March, 1908, and in the second case, while the date of the commencement of the action is not shown, it appears from the first paragraph of the opinion that claims were permitted to be recovered for a period of four years beginning April 1, 1903.

MOVEMENT OF A SHIPMENT FROM A FARTHER POINT HAVING A CHEAPER RATE IS NOT AN ESSENTIAL ELEMENT OF CASE.

Sec. 6 of the Act provides:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unles the *rates*, fares and *charges* upon which the same are transported by said carrier *have been filed and published* in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different

> compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

By this section the establishment of a rate establishes the charge. The charge is not brought into existence by the movement of a shipment. The charge exists before the shipment is ever made. By examination of the tariff the shipper can ascertain the charge from a given point and can rely upon the rate shown in the tariff as being such charge without first ascertaining whether a shipment to which said rate is applicable has ever moved from such point. It was for the purpose of establishing such certainty that Sec. 6 was enacted. The words "rates" and "charges" are clearly synonymous. This appears from the second proviso of Sec. 4 which reads:

> "No rates or *charges* lawfully *existing* at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act."

It is incongruous to speak of a charge as existing if it refers only to actual transactions as contended by petitioner. To lawfully exist a charge must be established. It can be established only by filing and publishing a rate. The existence of a charge connotes a continuance thereof as shown in

the *Louisville & Nashville Ry. Co. case, supra.* Therefore the establishment of a rate is the establishment of a charge, and the continuance of a rate is the continuance of the charge of that rate.

If Secs. 4 and 6 of the Act are to be given a harmonious construction, the word "charge" in the long and short haul provision must be construed in the same sense in which the word "charges" is used in Sec. 6, as in the fourth section Congress must have had in contemplation the rate filed and published which, until so filed and published, under the express provisions of Sec. 6, does not become a charge, and the date on which it becomes a charge is not fixed by the date on which the first shipment moves taking such rate, but by the date designated by the carrier as the time the tariff containing such rate is to become effective.

The alternative provision in Sec. 4 making it unlawful to charge or receive a higher rate for a shorter than for a longer haul shows that its application is not limited to cases where there has been actually received a higher rate but also applies to cases where a higher rate is charged, and as above shown, a rate is charged as soon as it is established.

It is the filing and publishing of the Billings rate, and not the movement of a shipment from Billings, that gives the shipper from Benchland the right to have his shipment hauled at that rate. The only point from which a shipment must move to prove a violation, is from Benchland.

Certainly if the tariff contained a cheaper rate for the same commodity for a longer than for a

shorter distance, the carrier would not contend before the Commission that such was not a violation of the long and short haul provision and that the Commission could not compel a change in such rates so as to make them conform to the rule established by the long and short haul clause until it is shown that shipments have been made from both the farther and the intermediate points.

In the case of *Missouri & Kansas Shippers' Ass'n. v. M. K. & T. Ry. Co.,* 12 I. C. C. 483, cited by petitioner as holding that a rate is a paper rate until a shipment taking such rate has actually been made, the report of the Commission shows that even the carrier did not know that the cheaper rate relied on by the shipper had ever been published. Without it clearly appearing to the contrary, it should not be assumed that in the case cited the Commission undertook to override the express provision of Sec. 6 that a carrier, in making its charges, is limited to the rates filed and published. (*Beeghly v. Public Utilities Commission,* (Ohio) 135 N. E. 641)

The other case cited, *S. J. Greenbaum Co. v. Southern R. R. Co.,* 38 I. C. C. 715, involves a claim for damages based upon a rate found by the Commission to be discriminatory, and the Commission correctly held that claimant could show no damages without first showing that a shipment actually moved at the lower rate from the point alleged to have been unlawfully favored. The decision is merely in accordance with the decision of this court in *Penn. R. R. Co. v. International*

Coal Company, 230 U .S. 184. In the *Greenbaum case* no fourth section violation was involved.

THE CASE OF DAVIS, AGENT, V. PORTLAND SEED COMPANY, IN WHICH THIS COURT GRANTED A PETITION FOR A WRIT OF CERTIORARI, IS DITINGUISHABLE IN THAT IT IS AN ACTION FOR DAMAGES AND WAS BROUGHT IN A FEDERAL COURT.

The case cited in the above heading is a companion case to the case of *Davis, Agent, v. Parrington,* both of which cases were decided together by the Circuit Court of Appeals for the Ninth Circuit. (281 Fed. 10) The former case is now pending in this court on writ of error, (No. 595 on the docket for the October term, 1922), and the latter on writ of certiorari. (No. 573 on the same docket) The latter case involved less than $1,000.00. Hence it could not be reviewed by this court on writ of error, (Sec. 240, Jud. Code), and the petition therein for a writ of certiorari was not resisted. Both cases are based upon Sec. 8 of the Interstate Commerce Act providing for the recovery of damages, including an attorney's fee, by the shipper where the carrier has violated the provisions of the Act, and for the recovery of which damages a federal court, Sec. 9 of the Act provides, is the only court in which an action may be brought. In the cases cited the Circuit Court of Appeals held that where more has been charged for a shorter than for a longer haul in violation of Sec. 4, "there is a remedy by action *in damages* in court," citing

Sec. 9, and as a part of such damages the court allowed the recovery of an attorney's fee under the provisions of Sec. 8.

Thus in these two pending cases the question presented is what constitutes damages where there has been a fourth section violation, while here the question involved is the right to recover *as money wrongfully collected* the difference between the rate paid and the rate that would have been paid if the shipment had moved for a longer distance, namely, from Billings, in excess of which latter rate the carrier could not lawfully charge under the long and short haul provision. No attorney's fee was asked for or allowed here.

This court can grant a petition for a writ of certiorari in any case brought in a federal court, where the above cited cases were brought, when a writ of error cannot issue, regardless of the nature of the question involved, (Sec. 240, Jud. Code), but in no case is the discretion of this court to be appealed to for the granting of a writ of certiorari to a state supreme court unless the petitioner claims that the lower court passed upon some right, title, privilege or immunity claimed by the petitioner under the federal constitution or some treaty or statute of the United States. (Sec. 237, Jud. Code)

In an effort to come within this limitation the petition here is drawn on the assumption that this is an action for damages and that the difference between the rates for the shorter and longer distances was held here, as in the *Portland Seed Company case,* to be the measure of damages. But it ap-

pears from the decision of the state supreme court that this case is, and was decided as, an action for money had and received. The court held that not more than the Billings rate could lawfully be collected under the fourth section on shipments from Benchland and therefore allowed a recovery of the difference between the Benchland and Billings rates as so much money wrongfully collected. The decision goes no farther.

CONCLUSION

Inasmuch as this petition is addressed to the discretion of this court it would seem that there is no occasion to grant it unless there is assigned as error the holding of the lower court in respect to some right, title, privilege or immunity claimed by the petitioner under the Interstate Commerce Act and there is reasonable ground for contending that in such respect the decision is erroneous. Only four errors are assigned. (pp. 9 & 10) An examination of them discloses either that no such right, title, privilege or immunity was passed upon, or that if it was, clearly that which is assigned as error is not error.

1. As we have shown that this a common law action for money had and received, which remedy is expressly preserved by Sec. 22 of the Act, the state court undoubtedly had jurisdiction thereof.

2. Sec. 16 of the Act contains no provision whatsoever making the period of limitations therein provided applicable to such an action as this and this action is not barred under the Act.

3. The court did not err in holding that the Benchland rate was unlawful (a) notwithstanding it was not shown that a shipment had moved from Billings, the longer distance, at the cheaper rate, and (b) notwithstanding petitioner had made application to the Commission for permission to charge a lower rate from Billings. Sec. 4 does not contain any provision that a higher rate for a shorter distance is unlawful only when a shipment has been made at a cheaper rate for a longer distance. That the mere application to charge a cheaper rate from Billings gives the right to do so before the application is granted by the Commision, is so frivolous that it is not even argued by petitioner. The shipments in question moved in 1913 and 1914, which was long after the expiration of six months from the passage of the Act of June 18, 1910, which was the time allowed to continue to charge a cheaper rate for a longer than for a shorter distance.

4. As this is an action for money had and received it was properly decided as such. The question of whether any damage was sustained by reason of the violation of Sec. 4 was not involved. To justify the court in refusing to dismiss the action it was necessary to prove only that more was collected than the law permitted to be collected.

It is respectfully submitted that the petition should be denied.

FREDERICK M. MINER,
JOHN P. DEVANEY,
DEWITT CLINTON EDWARDS,
WALTER W. PATTERSON,
Attorneys for Respondent.

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No. 820

JAN 29 1923
WM. R. STANSBU

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT OF SAME.

F. G. DORETY,
R. J. HAGMAN,
Attorneys for Petitioner,
1120 Great Northern Bldg.,
St. Paul, Minnesota.

January 15, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable The Supreme Court of the United States:

The Great Northern Railway Company, the petitioner above named, respectively prays your Honorable court to require, by writ of certiorari or otherwise, that there be certified to your court, for review and determination, that certain cause entitled McCaull-Dinsmore Company, Respondent,

vs. Great Northern Railway Company, Appellant, bearing Docket No. 23141 in the Supreme Court of the State of Minnesota, wherein a final judgment has been rendered by said Supreme Court of the State of Minnesota on December 15, 1922.

The said cause involves several questions as to the construction of Section 4 and other sections of the Interstate Commerce Act of the United States, the one of greatest public interest being the question whether a shipper of interstate freight who has paid a charge for a shorter haul, which charge is reasonable *per se* but is higher than one published for a longer haul in the same direction and over the same line, can recover the excess without proof that he has suffered damage other than the mere payment thereof. The Interstate Commerce Commission has consistently held in the negative in a long series of decisions, of which the best known and most fully discussed is that of Iten Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729. The decisions of the Commission in these cases are based upon the principle established by this court in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184. The Supreme Court of Minnesota in the cause at bar has held to the contrary and sustained a recovery by a shipper in such a case, one justice dissenting and indicating a willingness to follow the contrary rule which has governed the decisions of the Interstate Commerce Commission. The present situation is, therefore, that a shipper who goes before the Interstate Commerce Commission to recover reparation in the

case of a violation of the long and short haul clause cannot recover, but if the same shipper goes before the Minnesota courts on the same cause of action he can recover.

On November 13, 1922, this court in your Docket 573, issued a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of Davis, Agent vs. Portland Seed Co., decision in which was reported in Vol. 281 Fed. 10, and which also sustained the right of recovery of reparation under the long and short haul clause, this view being contrary to the well established rule of the Interstate Commerce Commission and contrary, as we believe, to the ruling of this court in the International Coal Company case, *supra*.

If the decision of this court upon the return to said writ should result in a reversal of the judgment of the Circuit Court of Appeals, such decision would in principle require a reversal of the decision of the Supreme Court of Minnesota in the cause at bar; but unless a writ is granted in this cause said judgment will forthwith become enforcible and your petitioner will be compelled to pay the same and will have no redress and no means of recovering such payment.

The cause at bar involves only $596.00, but similar cases are pending against your petitioner in the District Court of Hennepin County, Minn., brought by the same attorneys, which with interest now involve over $43,000.00; and the parties have stipulated that the final judgment in said actions shall be entered in conformity with the final judg-

ment in the cause at bar. It follows that unless writ is granted in this cause, your petitioner w have been compelled to pay the sums demanded all of said actions, aggregating over $43,000.00, and if your judgment in Davis, Agent v. Portland Seed Co. shall, as we believe that it should, result in establishing the impropriety and unlawfulness of such payments, your petitioner will nevertheless have no redress and no means of recovering the same, and the shippers will have received large rebates from their lawful freight payments, contrary to law.

Your petitioner is a corporation and a common carrier by railroad between points in Montana and in Minnesota. Respondent, between August 26, 1913, and September 30, 1914, shipped 37 carloads of wheat from petitioner's station of Benchland, Mont., to Minneapolis and Duluth, Minn., at the published tariff rate of 36 cents per cwt. Petitioner's same tariff carried a rate of 28 cents per cwt. from Billings, Mont., a more distant point, which was published to meet and compete with a rate of the Northern Pacific Railway Company which had a much more direct and shorter haul from Billings to the same Minnesota destinations. Although 30 cents, the amount paid, was the published rate from Benchland, the respondent alleged in said action that 28 cents, the rate from the more distant point of Billings, was the lawful rate, and prayed for a refund of the difference of 2 cents per cwt. The cause was brought in the District Court of the Fourth Judicial District, Hennepin County,

Minn., and judgment for plaintiff therein was affirmed by the Supreme Court of Minnesota on December 15, 1922.

Your petitioner as the defendant in said action claimed the following rights, privileges and immunities under statutes of the United States:

1. Your petitioner claimed and set up by affirmative defense in its answer that the charges collected by it were its lawfully published tariff charges, which it was privileged to collect and retain under the provisions of Section 6 and other provisions of the Interstate Commerce Act of the United States.

2. Petitioner claimed that while Section 4 of the Interstate Commerce Act makes it unlawful to charge and receive more for a shorter distance or less for a longer distance, it does not fix the lawful rate in either case; that no lawful rate had been fixed or existed in the case at bar; that the determination of a lawful rate is a prerequisite to an action for refund and is an administrative function and not judicial. Petitioner, therefore, claimed that the court had no jurisdiction of this cause, and that it was entitled to a dismissal of the action under the terms of the Interstate Commerce Act. This claim was presented to the court by paragraph I (c) 4 of the petitioner's motion for amended findings, (page 34 of the printed record in the state court) and by paragraph I (a) of petitioner's assignments of error, and by briefs.

3. Petitioner claimed that the unlawfulness declared by Section 4 of the Interstate Commerce Act is analogous to the unlawfulness declared by Sections 2 and 3, and that under the provisions of said Act as construed in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184, such unlawfulness does not give rise to a cause of action for damages without proof that the shipper has sustained damage other than by the mere payment of the unlawful rate. This claim was set up in paragraph I (b) 13 and (c) 2 of petitioner's motion for amended findings, (page 34 of the printed record in the state court) and in paragraphs I (c), II 13 and III 2 of petitioner's assignments of error.

4. Petitioner claimed that said action was barred by Section 16 of the Interstate Commerce Act, as construed in Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, fixing two years as the statute of limitations for actions to recover freight charges collected in violation of the Interstate Commerce Act. The cause of action at bar accrued in 1914 and the action was not commenced until August, 1920, nearly six years thereafter. Petitioner, therefore, claimed immunity from suit under said Section 16, which claim was set up in paragraph IV in its assignment of errors.

5. Petitioner claimed that this was an action for violation of the Interstate Commerce Act brought under Section 9 of said Act, and that it was not a common law remedy which was pre-

served to the plaintiff under Section 22 of said Act; and that under Section 9 jurisdiction is conferred exclusively upon the Interstate Commerce Commission and the Federal courts, and that if this cause could be the subject of court jurisdiction at all the jurisdiction should be that of the Federal and not of the state court. Petitioner, therefore, claimed immunity from suit under Section 9, which claim was set up in petitioner's motion for amended findings and conclusions of law and in its assignment of errors and by brief.

6. While it was admitted in said action that petitioner had *published* a lower rate for a longer distance than the rate collected from Benchland, there was no evidence or claim that it had ever "charged or received" such lower rate, or that any freight had ever moved over the longer distance at the lower rate. In other words, the lower rate was a "paper" rate and petitioner, therefore, claimed and still claims that the collection of the freight charges in question were not in violation of Section 4 of the Interstate Commerce Act or of any other statute, and claimed immunity from recovery or refund under said statute, which claim was set up in paragraph I (b) of petitioner's motion for amended findings and conclusions (page 33 of printed record) and in assignment of error No. II.

7. Petitioner claimed that the rates in question from Benchland, Mont., were lawfully existing on June 18, 1910, the date of the amendment to Sec-

tion 4 of the Interstate Commerce Act, upon which this cause of action was predicated, and that an application had been filed by petitioner with the Interstate Commerce Commission within six months after the passage of said amendment for authorization "to continue class and commodity rates" on certain freight, including grain from Billings, Mont., to St. Paul, Minn., lower than the rate from Benchland and other intermediate points. The precise facts of the situation are stipulated in paragraph Ninth of the stipulation of facts (pages 12 to 14 of the printed record). This application remained undetermined by the Commission at the time the shipments in question moved, but was subsequently rejected by the Commission in the case of the grain rates, on the ground that the Billings rate on grain had not been reduced below the intermediate basis until after the petitioner's application was filed before it. Your petitioner nevertheless claimed in this cause that its said application was sufficient as a matter of law to comply with the requirements of Section 4, as amended June 18, 1910, and claimed immunity from recovery or refund under said statute, which claim was set up by petitioner in said stipulation of facts and by brief before the lower court.

The decision both of the District Court of Hennepin County and the Supreme Court of the State of Minnesota was against each of the aforesaid rights, privileges and immunities claimed by your petitioner, and the said Supreme Court of the State

of Minnesota is the highest court in said state wherein a final judgment in said cause could be had. The facts stated in this petition will more fully appear from the certified copy of the transcript of the record in said cause, which is filed herewith.

Your petitioner avers that the said Supreme Court of the State of Minnesota, as well as the District Court of Hennepin County, Minnesota, erred

(1) In assuming jurisdiction of said action and in assuming the right to determine a lawful rate applicable to the shipments in question other than the rate set forth in petitioner's tariff.

(2) In failing to hold that said action was barred by Section 16 of the Interstate Commerce Act.

(3) In failing to hold that the rate in question was not unlawful under Section 4 of the Interstate Commerce Act, because

(a) Petitioner had not charged or received but had only published a lower rate for a longer distance.

(b) The publication of said lower rate was protected by application before the Interstate Commerce Commission for lawful authorization filed as required by Section 4 of the Act and undetermined at the time of the collection of the charges in question.

(4) In failing to dismiss the action upon the ground that the respondent had not suffered any damage as the result of the alleged violation of Section 4.

Your petitioner has herein no right of appeal to or writ of error from this honorable court. Your petitioner presents herewith as a part of this petition a brief showing more fully its view upon the questions involved, and also a certtified copy of the entire transcript of record in the said case, including the proceedings in the said Supreme Court of the State of Minnesota, marked Exhibit "A".

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Minnesota, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Minnesota, and of the District Court of Hennepin County, Minn., in this case, to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate, and, that the said judgment of the said Supreme Court of the State of Minnesota may be reversed by this honorable court.

Respectfully submitted,

F. G. DORETY,

R. J. HAGMAN,

Attorneys for Petitioner.

STATE OF MINNESOTA,
County of Ramsey.—ss.

F. G. Dorety, being first duly sworn, deposes and says that he is one of the attorneys for the petitioner named in the above and foregoing petition, and that said petition is true to the best of his knowledge, information and belief. That this petition is made in good faith and not for the purpose of delay.

F. G. DORETY.

Subscribed and sworn to before me this 15th day of January, 1923.

EARLE W. McELROY,
Notary Public, Ramsey County, Minn.
My Commission Expires Feb. 23, 1925.

(SEAL)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ASSIGNMENT NO. 1—THE COURT HAD NO JURISDICTION.

Section 4 of the Interstate Commerce Act, as amended June 18, 1910, and so far as pertinent in this proceeding, reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the

same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission. * * * "

The respondent (plaintiff below) claims that Section 4 of the Interstate Commerce Act should be construed as though it read as follows:

> "Whenever a carrier charges more for a shorter distance than for a longer distance, the rate in effect at the more distant point

> shall be the lawful rate or maximum rate at all intermediate points."

and that since 28 cents was the published rate at the more distant point of Billings, therefore it was the maximum lawful rate at the nearer point of Benchland, and as the carrier collected 30 cents, there was a straight overcharge of 2 cents for which action would lie in court without proof of any other damage. This construction supposes that the lower rate at the more distant point is an entirely lawful rate in itself and that it also functions as the measure of the rate at intermediate points.

Petitioner claims that the statute is in the nature of a discrimination statute; that a higher rate at a nearer point creates prejudice and a lower rate at a more distant point creates a preference and that both are equally unlawful; that the lower rate at the more distant point is neither a lawful rate at that point nor a proper measure of the rate at the nearer point; that there is no lawful rate at either point, and that no action for a refund can be brought in court until a lawful rate has been established by the Commission.

If Congress had intended to make the lower charge at the more distant point the lawful rate or the maximum rate at all intermediate points, it certainly could have said so much more clearly. The fact that it did not expressly say so gives rise to doubt as to whether it intended any such thing.

Further doubt will arise when we note the proviso in Section 4:

> "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge *less* for *longer* than for shorter distances," etc.

It will be noted that the authority which the carrier is to apply for here is authority to charge *less* for a *longer* distance, thus implying that without such authority the smaller charge for the longer distance would be unlawful. In other words, Congress evidently regarded the lower rate for the longer distance as being just as unlawful as the higher rate for the shorter distance. It was evidently considered immaterial whether the prohibition were directed against a higher rate for a shorter distance or against a lower rate for a longer distance. The two are regarded as having the same effect and as being interchangeable.

We can get a pretty fair test of the soundness of the respondent's reasoning if we assume that the prohibition were directed expressly against the lower rate for the longer distance. If the statute declared it unlawful to charge less for a longer than for a shorter haul, then, under respondent's reasoning, the higher rate for the shorter haul is a lawful rate. Only the lower rate for the longer haul would be unlawful. The statute would fix the higher and shorter rate as the minimum for the longer haul and if the carrier collected less it would have an action in court for a straight undercharge.

This reasoning is identical with that upon which the court below awarded judgment against us, but we venture to assert that if the very same reasoning were advanced by a carrier in a case of that sort, the Supreme Court of Minnesota would be the very first to repudiate it. Under a statute so worded, everyone would agree, we think, to the sort of construction which we are advocating here, that is, that the effect of the statute would be to declare an unlawful prejudice at the nearer point and an unlawful preference at the farther point, both being equally unlawful. It would be clear that the unlawfulness would inhere as much in one rate as in the other.

It is our contention that, whichever way the statute be worded, it should be construed as declaring it unlawful to charge more for a shorter or less for a longer haul.

Undoubtedly, Congress had the *power* to enact such a statute as this; and undoubtedly, under such a statute the carrier could neither apply a shorter and higher rate as lawful at the more distant point nor the lower and longer rate as lawful at the nearer point. There could be neither a straight overcharge at the nearer point nor a straight undercharge at the farther point. Under such a statute there would be no lawful rate at either point, and a shipper alleging a charge actually collected to have been unlawful, would be compelled, under the doctrine in Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, to apply to

the Commission to fix the lawful rate, and could not recover any alleged overcharge in court.

Respondent's theory that the fourth section should be construed as making the published rate from the more distant point the lawful rate from the nearer point and that any payment in excess of the rate from the more distant point is a straight overcharge, just as though the tariff called for 50¢ and the railway agent through error collected 60¢, and can be recovered in court without first resorting to the Commission, results, of course, in the *lawful* rate from the more distant point and the nearer point being the *same*. In other words, the carrier would receive as great compensation for the shorter as for the longer distance. Such a construction of the fourth section is utterly irreconcilable with the language of that part of the fourth section indicated in italics below:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, *but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance.*
> * * * "

The italicised language of the fourth section quoted above we believe presents not only a cogent reason why the construction given the fourth section by the Minnesota Supreme Court and by respondent is untenable, but supports our contention that where more has been charged for a shorter than for a longer haul in violation of the fourth section Congress did not fix a lawful rate by legislative mandate but intended that the lawful rate from both the more distant and the nearer points should be fixed by the Commission in the exercise of its administrative functions, as is the case where a rate has become unlawful because of the provisions of section 2 or 3 of the Act.

We believe that these illustrations will suggest a question at least as to whether this was not the real intention of Congress and whether the statute as actually worded should not be construed as making both rates unlawful, and as leaving both points without any lawfully published rate.

We have already pointed out four reasons which would support this construction:

1. That the statute does not *expressly* declare the lower and longer rate to be the lawful rate at the intermediate points.

2. That the proviso requiring authority for publishing a lower rate at a more distant point implies that the lower rate as well as the higher would be unlawful in the absence of special authority.

3. That the same reasoning which would require application of the lower rate as the lawful rate at intermediate points would, if the wording were reversed, require application of the higher rate at the more distant point.

4. That the fourth section itself specifically provides that that section shall not be construed as authorizing a carrier to charge or receive as great compensation for a shorter as for a longer distance. There is no prohibition against a carrier publishing such rates in the first instance or against the Commission establishing such rates, but the fourth section makes it clear that the fourth section itself is not to be taken as bringing about such a situation.

In addition to these four reasons there are other considerations which would seem to require that the statute be construed as declaring both rates unlawful.

1. This would be in accord with the rate regulating policy of Congress as indicated in other sections. It is the policy of Congress upon declaring a rate unlawful, not to fix the lawful rate by legislative mandate, but to have it fixed by the Commission. Thus, under Section 3, where two rates exist, one preferential to point A and the other prejudicial to point B, the lower rate at point A is not made the lawful rate at point B, but the whole matter is left to the Commission to remove the unlawfulness, either by lowering the higher rate or raising the lower rate, or both.

Congress recognizes throughout the balance of the act that the fixing of lawful rates is an administrative function and confides the exercise of that function solely to the Commission. To warrant the conclusion that Congress in Section 4 adopted the opposite policy of fixing the intermediate rates by legislative mandate should require an express declaration that the lower rate should be the lawful rate at intermediate points. If such had been its intention, it would have been very easy to say so instead of leaving the matter to implication.

2. It must be borne in mind that Section 4 is only one of the rate regulating sections: it should be construed together with others. Congress has declared that in order to be lawful a rate must be be

(a) Reasonable under Section 1.

(b) Non-discriminatory under Section 2.

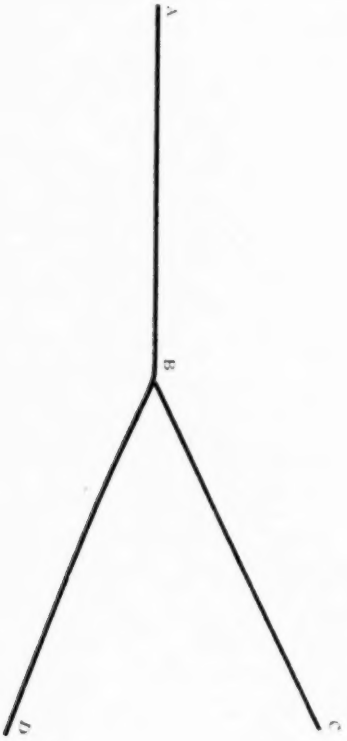
(c) Non-prejudicial under Section 3.

(d) Not in excess of longer rates under Section 4.

The lawful rate is clearly a rate that complies with all four of these requirements. There are four limitations within which the rate must come. That prescribed by Section 4 is only one of them, and to hold that Congress meant to establish the Section 4 limitation as the lawful rate, or even as the maximum rate, is to ignore the other limitations. It is much more reasonable to suppose that, upon exceeding any one or more of these limitations, *the entire rate*, and not merely the excess over the

limitation, would be unlawful, and would require administrative action by the Commission.

3. There are practical difficulties in the application of the other construction of the statute. Suppose, for instance, a situation like that shown in the following diagram: The rate A-B being 30 cents, the rate A-C being 28 cents, and the rate A-D being 27 cents.



Suppose a shipper at B discovers the 28 cent rate at C and recovers the 2 cent excess in court on the theory that the rate at C is the lawful rate at B. Suppose later he discovers a 27 cent rate at D and brings another action. The court, having first found 28 cents to be the lawful rate, would undoubtedly have to reverse itself and declare 27 cents to be the lawful rate. The difficulty in establishing lawful rates by legislative mandate in this way, contrary to the rate published in the tariff, is that different shippers may discover different and varying Fourth Section violations at the same point, and there is no fixity in the rate. The court may have discovered the lowest rate for a longer distance, or it may not.

Even without this complication, there may be important reasons why the rate at point B should not be made either 28 cents or 27 cents. There may be a nearby offline point where the rate is 30 cents, so that a 27 cent rate at B would create a preference. This situation should be considered in determining the lawful rate at B. Such a situation illustrates the ramifications which exist and which must be considered in rate making, and which prove the necessity for administrative action.

The fact that unlawfulness may arise from and inhere in the lower rate at the more distant point is well illustrated in the present case. The record shows that there was a rate of 30 cents at both Benchland and Billings in 1912, i. e., the same rate which is now complained of at Benchland was then

in effect and was perfectly lawful. The alleged Fourth Section violation arose not by any change in that rate, or in the circumstances surrounding it, but from a *lowering of the more distant Billings rate*, and the violation was subsequently removed by raising the Billings rate back again to its former level. In other words, the act which brought on the alleged unlawfulness and which later removed it again was not any change in the rate which is complained of but was a change in the more distant rate, which certainly lends color to the contention that the unlawfulness inheres at least as much in the lower rate for the longer haul as in the higher rate for the shorter haul.

We believe that it will be apparent from these simple illustrations that the whole problem of fixing lawful rates under the Fourth Section is an administrative one and must necessarily be so. Congress simply declares the unlawfulness and this unlawfulness inheres in every part of both rates and not alone in the excess in the intermediate rate. Congress does not provide how the unlawfulness shall be removed; that must be determined by the Commission, and it may be removed, as in the case of any other preference or prejudice, by lowering the higher rate or raising the lower rate, or both. In the absence of an express declaration by Congress that the lower rate shall be the lawful rate at both points, we should not attribute to it, by implication, a declaration so at variance with its usual policy.

Assignment No. 4—No Recovery Without Proof of Damage.

If it be granted that the effect of Section 4 is to destroy both rates—so that there is no "lawful" rate at either point—the question arises whether a shipper who has paid a charge, named in a tariff, but not lawfully published, is thereby given a cause of action either in court or before the Commission. We believe the answer is that if he has sustained damage as a result of the unlawful act, he has a cause of action for such damage, the situation then being similar to that in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184, where the plaintiff was charged more than a competitor for the same service. His charge was, therefore, unlawful, but in order to enable him to recover he was compelled to prove "damage" which might or might not be the amount of excess over what the competitor was charged.

Of course, if the rate were unreasonably high in violation of Section 1, i. e., if the shipper has paid all the service was reasonably worth and something in addition, he has paid something for nothing; money has been taken from him for which he got no return. And this, under the decision in Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, is damage *per se*. But in a Fourth Section case, if the charge paid was reasonable, i. e., if he got full value for his money, he cannot, under the International Coal Co. decision, recover some part of what he paid, merely because the rate paid was

an unlawful rate; he must go further and prove damage. In the case of McClelen et al. v. Southern Ry. Co. et al., 6 I. C. C. 589, 599, the Commission said with reference to the Fourth Section:

> "The exaction, without lawful excuse, of a greater compensation in the aggregate for the shorter than for the longer haul over the same line in the same direction, the shorter being included in the longer, which is forbidden by section 4 of the act to regulate commerce, is only a form of unjust discrimination or undue preference, to which, it seems, Congress desired to call particular attention because of its prevalence in certain sections of the country."

The principle of the International Coal Company case, *supra*, that recovery cannot be had without proof of damage where there has been a violation of the section prohibiting unjust discrimination, rather than the principle of the Darnell-Taenzer case, *supra*, permitting recovery without proof of damage where there has been a violation of the section of the act prohibiting unreasonable rates, we believe is applicable to a cause of action predicated on a violation of the fourth section.

In this connection we invite the attention of the court to the many decisions of the Interstate Commerce Commission applying the reasoning which we have been advancing and holding that a shipper who has paid more for a shorter haul cannot recover the excess by way of reparation without proving that he has been damaged by the lower rate charged for the longer haul.

Nix & Co. v. S. Ry. Co., 31 I. C. C. 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146.

La Crosse Shippers' Asso. v. C. & I. L. Ry. Co., 43 I. C. C. 520, 524.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

S. J. Greenbaum Co. v. Southern Ry. Co., 38 I. C. C. 715.

Oregon Fruit Co. v. Southern Pac. Co., 50 I. C. C. 719.

Iten Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729.

Illinois Brick Co. v. Director General, 57 I. C. C. 320.

The reasoning of the Commission in Iten Biscuit Co. v. C. B. & Q. R. R. Co., *supra*, displays such a thorough and scholarly consideration of the question and sets forth so forcibly the reasons upon which we are relying here that we take the liberty of quoting it at length:

> "With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.
>
> "Distinction must be made between the carrier's unlawful act which renders it liable to prosecution, and the shipper's right to damages for any pecuniary injury occasioned thereby.

The original bill for an act to regulate commerce, which passed the Senate May 12, 1886, proposed, under Section 2, among other things, that a carrier violating the provisions thereof should be liable to respond in damages to the extent of the difference between the rate paid and the lowest rate charged upon like shipments; in section 3, after declaring unlawful any undue or unreasonable preference or advantage, it proposed to establish a cause of action in damages for violation of its provisions, but did not fix the measure of damages; and in section 4 the carrier was to be made liable to the person or persons against whom any excessive charges were made for all damages occasioned by a violation of the provisions thereof. But, as enacted, sections 2, 3 and 4 were amended by striking out the clauses giving right of action for damages, and section 8 was substituted as a general section covering the omitted clauses of the three sections. In commenting on this omission the Supreme Court in Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, said at page 198:

"'The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee, to support the present argument that Sec. 8 means the same thing as the omitted clause. * * * Section 2 of the original Senate Bill said nothing about *damages*, but

in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Sec. 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.'

"In discussing in this case the civil side of the act, the court said:

"'On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8), "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government.'

"While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3 and 4, and what was there said is equally applicable to section 4.

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which

we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable *per se* and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and consequent damage. In this instance, as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pac. Co. v. Darnell-Taenzer Co., *supra*, may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the

court was 'whether the fact that the plaintiffs were able to pass on the damage they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3 there must be proof of damage and under section 4 the departure therefrom is of itself proof of damage.

"We affirm our previous conclusion, and hold that in the absence of proof of the fact and amount of damage to complainant an unauthorized departure from the long and short haul rule of the fourth section of the act does not entitle complainant to an award of reparation."

It was argued below that if the respondent had conceded our conclusion that no lawful rate existed and had gone to the Commission to establish a lawful rate, the Commission could not, under Section 4, have established any higher rate than the more distant Billings rate of 28 cents. The answer to this, of course, is that, under our construction, unlawfulness arises from the comparative situation and inheres as much in the lower and more

distant rate as in the higher intermediate rate. For this reason the lower rate is itself unlawful and cannot be used as a measure of a lawful rate either for Billings itself or for Benchland. The Commission might, therefore, establish the lower rate at both points or the higher rate at both points or different rates at each point. If it should, after considering all of the sections of the statute, conclude that the 30 cent charge collected was reasonable (as is admitted here), but that because of other complications the lawful rate should be 28 cents, such a finding would be analogous to a similar finding under Section 2 or 3, in which a rate reasonable under Section 1 might be declared unlawful under Section 2 or 3 and the lawful rate fixed at a lower amount. In such a case the carrier might be subject to prosecution and the shipper would be entitled to any damages actually suffered. But, having received full value for his payment, and having paid no more than the service was reasonably worth, he could not, because the charge was an unlawful charge, recover any part of it, except to the extent that he had actually suffered damage. We believe that the same rule would apply to the shipment of a commodity for which a charge had been collected without any tariff rate whatever having been published. If the Commission finds that it was unreasonably high the shipper could recover the excess, but if the Commission finds that the service was reasonably worth the charge the shipper could not recover without proof of damage, even though the Commission

might find that the provisions of Sections 2, 3 or 4 required publication of a lower rate.

Respondent offered no evidence whatsoever that it had been damaged. It merely proved that it paid a rate of 30 cents on its shipments from Benchland, and that the railway company contemporaneously published a rate of 28¢ from Billings. There is no evidence that any shipments were ever made on the 28¢ rate from Billings.

We believe that the foregoing establishes our assignment of error (1) and (4) in our petition. These are the questions of greatest public interest involved in the case. The other questions are of less wide public interest and will be discussed only briefly.

ASSIGNMENT NO. 2—THE STATUTE OF LIMITATIONS.

Section 16 of the act reads in part as follows:

> "* * * All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after."

The two year provision applies specifically to complaints filed with the Commission, but in the case of Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, an action had been brought in the Circuit Court of the United States for the Eastern

District of Michigan to recover the excess in a rate theretofore declared unlawful by the Commission. At page 666 the court says:

> "Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232) *whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.* This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction;* or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others *would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.*" (Italics ours.)

As plaintiff's cause of action is predicated on a violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act

and was not instituted until almost six years after the cause of action accrued, the rule above enunciated would require a dismissal of the action for the reason that it is barred by Section 16 of the Commerce Act.

ASSIGNMENT NO. 3.

The alleged violation was only a paper violation. It was not shown that any shipment had ever moved from Billings, the more distant point, at the lower rate, or that the carrier had "charged or received" a greater compensation for the shorter haul than it had actually "charged or received" for the longer haul.

In the case of Missouri & Kansas Shippers' Association v. M. K. & T. Ry. Co., 12 I. C. C. 483, the Interstate Commerce Commission said with reference to such a situation as we have here:

> "Although it is clear that the Class C rate was a paper rate only, so far as hay was concerned, and that the breach by defendant of the provisions of section 4 was therefore purely technical and in no sense substantial, the object of this petition is to take advantage of the situation and to secure reparation on shipments that moved to Kansas City while the defendant inadvertently permitted its tariffs to remain in that condition.
>
> "While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentious proceedings of this kind it ought

to examine into the real substance of the matter unembarrassed by considerations that are purely technical. Looking at the complaint from this point of view, it seems to us wholly without merit. We are unable to accept a merely theoretical or paper rate, for the longer haul, that has not been used and was unknown either to the defendant or to the complainant, until casually discovered after it had been the published rate for some years, as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate. This view of the matter is supported by the uncontradicted evidence of the defendant, tending to show that the Class C rate of 10 cents to St. Joseph was not a compensatory rate on hay, and by the complete failure of the complainant to show that the rate to Kansas City was in itself excessive. That issue although raised in the complaint was abandoned on the hearing."

A similar principle has been applied in discrimination cases. In S. J. Greenbaum Co. v. Southern R. Co., 38 I. C. C. 715, at 718, the Commission said:

"From the decision in the case cited (Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184) it is apparent that in order to hold a carrier or carriers responsible in damages for unjust discrimination it must be affirmatively established, among other things, that traffic actually moved at the lower rate from the point alleged to have been unlawfully favored over the line of the carrier or carriers responsible for the discrimination."

Conclusion.

There can, we believe, be no doubt that this is a case in which a writ of certiorari may properly issue. Several different and distinct rights, immunities and privileges were claimed by petitioner (defendant below) under a statute of the United States and the decision of the highest court of the state was against each of said rights, immunities and privileges claimed. The technical grounds for the writ undoubtedly exist.

That the discretion of the court should be exercised in favor of granting the writ appears from the fact that a writ has just been granted on November 13, 1922, in your Docket 573, in the similar case of Davis v. Portland Seed Co., 281 Fed. 10. The outcome of the present case will control the payment or non-payment of over $43,000.00, and the writ should be granted in order to stay this payment until the decision upon the merits in the said case of Davis v. Portland Seed Co.

Apart from this, the question involved is of widespread and vital interest and is the subject of contrary decisions by the Interstate Commerce Commission on the one hand and by at least one Federal court and the state court in the present case on the other. The dispute and doubt existing should be set at rest. There should be a uniform rule made applicable by the high authority of this court to be applied by all lesser tribunals.

And finally, the rate regulating policy of the Commerce Act is at stake. The decision at bar

would destroy that policy by substituting a rate made by legislative mandate for rates made through the administrative functions of the Commission.

Because of these considerations we respectfully pray that a writ be issued as prayed for in the petition filed herewith.

Respectfully submitted,

F. G. DORETY,
R. J. HAGMAN,
Attorneys for Petitioner.

Reversed.

DAVIS, AS AGENT, ETC. *v.* PORTLAND SEED COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY *v.* PARRINGTON.

DAVIS, AGENT UNITED STATES RAILROAD ADMINISTRATION, *v.* PARRINGTON.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

GREAT NORTHERN RAILWAY COMPANY *v.* McCAULL-DINSMORE COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 114, 122, 123, 209. Argued February 20, 1924.—Decided April 7, 1924.

1. The long and short haul provision of the Interstate Commerce Act (§ 4) is violated, and the carrier incurs, *prima facie* at least, the penalties prescribed by § 10, by publishing, without authority from the Commission, a rate for a longer haul lower than that scheduled for a shorter haul of the same kind of property over the same line or route in the same direction. P. 424.
2. In such case a shipper who is charged the higher rate for the shorter haul is entitled, under § 8, to the full amount of his resulting damages, with reasonable counsel fees, but not to collect from the

carrier the difference between the rate paid and the lower rate published for the longer haul upon the theory that the latter was the only legal rate and the difference an illegal exaction recoverable without proof of damages or regard to the intrinsic reasonableness of the rate. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184. Pp. 415, 424.

3. The ruling in *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133, that actions of this kind are subject to the two year limitation (Act to Regulate Commerce, §§ 9 and 16,) is adhered to. P. 426.

281 Fed. 10; and 154 Minn. 28, reversed.

REVIEW of four judgments recovered by shippers as overcharges alleged to have been exacted by the respective defendant carriers in violation of the "long and short haul clause" of the Interstate Commerce Act.

No. 114 was an action in the District Court for the difference between the freight paid during federal control on a shipment of alfalfa seed to Walla Walla, Washington, from Roswell, New Mexico, and the amount that would have been paid if a lower rate scheduled from a more distant point over the same route had been applied.

Nos. 122 and 123 were like actions in the District Court, upon claims assigned by various shippers, in respect of sugar transported by the above-named steamship company, wholly by water, from San Francisco, California, to Portland and Astoria, Oregon, partly while that company and its northern rail connection, the Oregon-Washington Railroad & Navigation Company, were under federal control, and at times when the joint rate of these carriers from San Francisco to North Portland, a greater distance, as it was claimed, was less than the local rate paid for the water carriage to Portland and Astoria. In these three cases the judgments for the plaintiffs were affirmed by the Circuit Court of Appeals; and its judgments were brought here by error and certiorari.

In No. 209, here by certiorari, the Supreme Court of Minnesota affirmed a like judgment in favor of a shipper whose shipments of wheat, from Benchland, Montana, to

Minneapolis and Duluth, Minnesota, were charged for by the carrier at a published tariff rate higher than the published rate to the same destination from Billings, a more distant point.

Mr. John F. Finerty and *Mr. Arthur C. Spencer*, with whom *Mr. Henry W. Clark*, *Mr. C. E. Cochran* and *Mr. John F. Reilly* were on the briefs, for petitioner in No. 114 and plaintiffs in error in Nos. 122 and 123. See *post*, p. 601.

The District Court was without jurisdiction, exclusive original jurisdiction being lodged in the Interstate Commerce Commission. *Texas & Pac. Ry. Co.* v. *Abilene Co.*, 204 U. S. 426; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Balt. & Ohio R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Texas & Pac. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138; *Northern Pac. Ry. Co.* v. *Solum*, 247 U. S. 477; *Director General* v. *Viscose Co.*, 254 U. S. 498; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Same* v. *Puritan Coal Co.*, 237 U. S. 121; *Same* v. *Sonman Coal Co.*, 242 U. S. 120; *St. Louis, etc., Ry. Co.* v. *Hasty & Sons*, 255 U. S. 252.

Section 4 of the Commerce Act (the long and short haul clause), is a statute relating to a form of discrimination and not one merely declaring the intermediate rate unlawful. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447.

Discrimination may be removed either by raising one rate, lowering the other, or changing both, and the fact that a rate discriminates against one locality in favor of another one does not in itself entitle the first locality to the same rate as the tariff provides for the second. *American Exp. Co.* v. *Caldwell*, 244 U. S. 617; *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 144; *Hillsborough Mills* v. *Boston & Maine R. R.*, 269 Fed. 816.

Section 6 of the Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. In view of this section the carriers were compelled to collect their published rates or refuse to accept the commodities for shipment. Commerce Act, §§ 4, 6.

Under § 6 the carriers must collect their published rates, even though they are violative of other sections of the act. *Armour Co.* v. *United States,* 209 U. S. 56; *Pittsburgh, etc., Ry. Co.* v. *Fink,* 250 U. S. 577; *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U. S. 156; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Poor Grain Co.* v. *C. B. & Q. Ry. Co.,* 12 I. C. C. 418; *Interstate Remedy Co.* v. *American Exp. Co.,* 16 I. C. C. 436; *Crescent Coal Co.* v. *C. & E. I. Ry. Co.,* 24 I. C. C. 149.

Under plaintiff's theory that the rate from Roswell was not a legally published rate, there was no legally published rate at all—the transportation must therefore have been unlawful, and the courts will not aid shippers in collecting any part of the charges which they paid. *Payne* v. *Bassett,* 235 S. W. 917.

The mere fact that a rate is violative of the long and short haul clause, does not entitle shippers to an intermediate point to recover the excess over the rate to the more distant point. *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447; *International Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 184; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.,* 53 I. C. C. 729; *Topeka Banana Dealers' Assn.* v. *St. Louis, etc., R. R. Co.,* 13 I. C. C. 620.

The long line of decisions of the Interstate Commerce Commission in Fourth Section violation cases holding that mere proof of the difference in the rates is no evidence of damage, should be followed by this Court, because not manifestly incorrect. *Heath* v. *Wallace,* 138 U. S. 573; *United States* v. *Cerecedo,* 209 U. S. 337.

The Federal Control Act, § 10, and Transportation Act, 1920, § 206 (c), lodged exclusive original jurisdiction of cases against the Director General involving violations of the Commerce Act in the Interstate Commerce Commission. *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Alabama, etc., Ry. Co.* v. *Journey*, 257 U. S. 111; 25 R. C. L. 1010; *Phillips Co.* v. *Grand Trunk Ry. Co.*, 236 U. S. 662; *Kansas City So. Ry. Co.* v. *Wolf*, 261 U. S. 133; *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554.

No violation of the Fourth Section was proved, because the evidence showed that there was no transportation from the more distant point, the rate being merely a paper rate. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447; Judson, Interstate Commerce, 3d ed., p. 529; *Topeka Banana Dealers' Assn.* v. *St. Louis, etc., R. R. Co.*, 13 I. C. C. 620; *Anaconda Copper Co.* v. *Director General*, 64 I. C. C. 136; *Lehigh Valley R. R. Co.* v. *Rainey*, 112 Fed. 487.

During federal control rates were initiated and maintained under order of the President, and the Fourth Section was therefore inapplicable to them. Federal Control Act, § 10; *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554; *Alabama, etc., Ry. Co.* v. *Journey*, 257 U. S. 111.

If there was a departure from the Fourth Section it was covered by appropriate orders of the Commission.

The measure of damages in Fourth Section cases is not the difference between rates. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Hillsborough Mills* v. *Boston & Maine R. R.*, 269 Fed. 816; *Homestead Co.* v. *Des Moines Elec. Co.*, 226 Fed. 49; *Atchison, etc. Ry. Co.* v. *Spiller*, 246 Fed. 1; *Clark Bros. Coal Co.* v. *Pennsylvania R. R. Co.*, 238 Fed. 642; *Lehigh Valley R. R. Co.* v. *American Hay Co.*, 219 Fed. 539.

Under § 15 of the Commerce Act, as amended in 1910 and 1920, transportation wholly by water is not subject to the act, notwithstanding the provisions of the Panama Canal Act. Commerce Act, § 15, 36 Stat. 552; Transportation Act 1920, §§ 408, 412, 413, 418; 41 Stat. 482, 483, 485; Fed. Stats. Anno., 1920, Supp., pp. 104–106; Panama Canal Act, 37 Stat. 560, 566; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; 2 Lewis' Sutherland Statutory Constr., 2d ed., p. 667.

Assignments of claims against the Director General not complying with § 3477, Rev. Stats., are void. *Spoffard* v. *Kirk*, 97 U. S. 484; *National Bank* v. *Downie*, 218 U. S. 345; *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554; *Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655.

No liability can attach either to the Steamship Company or the Director General on shipments moving during the time the Steamship Company's vessels were being operated by the Shipping Board. *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554; *Davis* v. *Zirkle*, 138 N. E. 266.

There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates and the paper rates to North Portland were joint rates. *Chicago & N. W. Ry. Co.* v. *Osborne*, 52 Fed. 912; *United States* v. *Mellen*, 53 Fed. 229; *Interstate Commerce Comm.* v. *Cincinnati, etc., Ry. Co.*, 56 Fed. 925; 162 U. S. 184; *Allen & Lewis Co.* v. *Oregon Ry. & Nav. Co.*, 98 Fed. 16; *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447.

The carriers were required during the first six months after federal control to collect the rates which they found in the Director General's tariffs, whether they conformed to the Fourth Section or not. Transportation Act, § 208 (a); *Wasatch Coal Co.* v. *Baldwin*, 60 Utah, 397; *Public Service Comm.* v. *New York Cent. R. R. Co.*, 185 N. Y. S. 267.

All claims antedating February 12, 1919, are barred because not brought within two years. Commerce Act,

§ 16; *Phillips Co.* v. *Grand Trunk Ry. Co.*, 236 U. S. 662; *Kansas City So. Ry. Co.* v. *Wolf*, 261 U. S. 133; Transportation Act, § 206 (f); *Eberhart* v. *United States*, 204 Fed. 884.

Mr. F. G. Dorety, with whom *Mr. R. J. Hagman* was on the brief, for petitioner in No. 209.

Mr. James G. Wilson for respondent in No. 114 and defendant in error in Nos. 122 and 123.

The District Court had jurisdiction.

Where the practice is directly prohibited by statute, the person injured thereby need not go originally to the Commission but may sue directly in court. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Same* v. *Puritan Coal Co.*, 237 U. S. 121; *Same* v. *Sonman Coal Co.*, 242 U. S. 120; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Same*, 230 U. S. 304; *St. Louis, etc., Ry. Co.* v. *Hasty & Sons*, 255 U. S. 252; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; Commerce Act, §§ 8, 9.

The transportation (in Nos. 122 and 123), though wholly by water, was subject to the Interstate Commerce Act.

The question whether the assignment of the claims against the Director General to the defendant in error (in No. 123) was void because not complying with § 3477, Rev. Stats., is not before this Court, it not having been raised in the lower court. Claims of this character may be sued upon by an assignee. *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S. 134; *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 559; *Parrington* v. *Davis*, 285 Fed. 741; *Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655.

Carriers (in Nos. 122 and 123) are liable notwithstanding certain of the boats on which part of the sugar was handled were under requisition of the United States Shipping Board for a portion of the period.

North Portland and Portland are on the same route, Portland being intermediate, on shipments from San Francisco to North Portland.

The actual showing that shipments have been made to North Portland as a condition to recovery is not necessary. *United States* v. *Louisville & Nashville R. R. Co.* 235 U. S. 322; *California Adjustment Co.* v. *Atchison, etc. Ry. Co.*, 179 Cal. 140.

The objection that certain of the claims sued on in Nos. 122 and 123 are barred by the statute of limitations, for the reason that the action was not commenced within two years was not properly made in the lower court, except as to those claims prior to January 1, 1918, in the case against the Steamship Company.

Reliance is had on *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133. That case had not been decided in this Court at the time the present cases were decided. The decision in that case in the lower court was to the contrary, as was the decision in the present cases. The Commerce Act itself does not specifically prescribe the limitation period for actions commenced by shippers before the court. The act does, by §§ 8 and 9, give a choice of forum either before the Commission or the District Court of the United States, but the act only specifically places a limitation upon proceedings before the Commission.

This Court, in the *Wolf Case*, bases its decision entirely upon its former decision in *Phillips Co.* v. *Grand Trunk Ry. Co.*, 236 U. S. 662; but that was a case on a claim which admittedly had to be commenced originally before the Commission. Such a case had been commenced before the Commission, not by the plaintiff in the *Phillips Case*, but by another plaintiff on a similar claim. The Commission had established the right to recover and the plaintiff in the *Phillips Case* commenced his action in court based upon the proceedings before the Commission, and the Court properly held that the per-

son commencing in the court could not have a different period of limitation than that before the Commission.

In the *Wolf Case* this Court holds that the same principle applies. We respectfully ask for a reconsideration of this ruling. The Court in the *Phillips Case* says that in those cases where the statute reads as does the Commerce Act, to-wit: that the proceeding shall be commenced within two years from the time the cause of action accrues and not after, the liability is destroyed. If this is the case, then we submit that the same rule should apply to all questions of damages in any case which might have been submitted to the Commission, whether it may be sued upon in the state court, the United States court, or before the Commission; and this Court has in several cases since the *Phillips Case* permitted recoveries in cases involving interstate traffic which could have been submitted to the Commission, but were commenced in the state courts, and recovery was permitted for periods considerably in excess of two years. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121; *Same* v. *Sonman Coal Co.*, 242 U. S. 120; *Same* v. *Stineman Coal Co.*, 242 U. S. 300.

This contention is further confirmed by consideration of *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; in connection with *Pennsylvania R. R. Co.* v. *Puritan Coal Co., supra;* and *Same* v. *Sonman Coal Co., supra.*

We respectfully submit that the rule should only be enforced as to those cases in which primary action must be brought before the Commission.

The Fourth Section order of the Interstate Commerce Commission, made in connection with the general advance in rates, can have no bearing in these cases, for the reason that it is not pleaded or relied on in the court below. *Robinson* v. *Balt. & Ohio R. R. Co.*, 222 U. S. 511. Furthermore, the order had not the general carry-all effect that opposing counsel contends for it.

As for the measure of damages, under the law the lower rate is the only rate which can be applied, as the higher rate did not exist. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314; *California Adjustment Co.* v. *Atchison, etc., Ry. Co.*, 179 Cal. 140; *Louisville & Nashville R. R. Co.* v. *Walker*, 110 Ky. 961.

It is true that the Interstate Commerce Commission has refused to follow this rule, basing its decisions upon *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184. That case, however, was not one for recovery of damages which were specifically provided by statute, but was an action for damage by one person who had been receiving a rebate on account of the fact that another shipper had received a greater rebate than he, and it was claimed that his measure of damages was the difference in the two rebates; but the Court held that, as neither person was claiming under a legal rate, he could only recover such damages as he could prove by reason of the fact that the other shipper had received a greater rebate. See *Southern Pacific Co.* v. *California Adjustment Co.*, 237 Fed. 965; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 534.

In the present cases the plaintiffs have paid out of pocket an amount which the statute said should not be exacted of them, and their damages are definitely fixed by the statute.

The effect of § 10 of the Federal Control Act and an order made in 1918 increasing then existing rates, was not raised or relied on in the court below. Furthermore, the violations in question were not thus validated. *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 560; *Johnston* v. *Atchison, etc., Ry. Co.*, 51 I. C. C. 356; *Rice Potato Co.* v. *Balt. & Ohio R. R. Co.*, 51 I. C. C. 365.

Transportation Act of 1920, § 206, did not transfer the jurisdiction of these matters from the court to the Commission, but shows the intention of Congress that the

jurisdiction of all controversies remain in the same courts or tribunals as before or during federal control.

It is not necessary to prove actual shipments from the more distant point. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 322; *California Adjustment Co.* v. *Atchison, etc., Ry. Co.*, 179 Cal. 140; *Beeghly* v. *Public Util. Comm.*, 104 Oh. St. 158.

Mr. Frederick M. Miner, Mr. John P. Devaney, Mr. Dewitt Clinton Edwards and *Mr. Walter W. Patterson* filed a brief on behalf of the respondent in No. 209, resisting the petition for a writ of certiorari.

Mr. Frank R. Wehe and *Mr. Alfred J. Harwood,* by leave of Court, filed a brief as *amici curiae* in Nos. 122 and 123.

Mr. John F. Finerty, by leave of Court, filed a brief as *amicus curiae,* on behalf of the Director General of Railroads, in No. 209.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The courts below affirmed judgments for the plaintiffs in four separate actions brought to recover alleged overcharges on freight said to have been demanded by the respective carriers in violation of the long and short haul clause, Fourth Section, Interstate Commerce Act, c. 104, 24 Stat. 379, 380; c. 309, 36 Stat. 539, 547; c. 91, 41 Stat. 456, 480, which declares—

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater com-

pensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; [The Transportation Act, 1920, added] but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. . . ."

All the cases involve the same fundamental question of law. The essential charge is that the carrier demanded and received greater compensation for transporting freight for a shorter distance than its published rate for transporting like property for a longer distance over the same route and in the same direction.

It will suffice to state the salient facts and issues disclosed by record No. 114—*Davis, Agent,* v. *Portland Seed Company.* They are typical.

Pecos is in Western Texas, 160 miles south of Roswell, N. M. A line of the Atchison, Topeka & Santa Fe Railway system joins these points and extends northward to Denver, Colorado, where it connects with the Union Pacific System which leads into the Northwest. January 4, 1919, the carrier received a car of alfalfa seed at Roswell for transportation to Walla Walla, Washington, by way of Denver. Three weeks later respondent Portland Seed Company received this car at destination and paid

freight charges reckoned at $2.44 per hundred pounds—the scheduled rate from Roswell. During all of January, 1919, the initial carrier's published schedule specified $1.515 per hundred pounds as the rate for transporting alfalfa seed from Pecos to Walla Walla through Roswell and Denver; and no application had been made to the Interstate Commerce Commission for permission to charge less for the longer than for the shorter haul. The Seed Company demanded judgment for the excess above the Pecos rate, as an overcharge illegally exacted and recoverable as money had and received.

The insistence is that under the long and short haul clause the lower published rate from Pecos became the maximum which the carrier could charge for the shipment from Roswell, notwithstanding the higher published rate therefor; that the sum charged above the Pecos rate amounted to an illegal exaction, recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate.

Relying on *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. *Nix & Co.* v. *Southern Ry. Co.* (1914), 31 I. C. C. 145; *S. J. Greenbaum Co.* v. *Southern Ry. Co.*, 38 I. C. C. 715; *Chattanooga Implement & Mfg. Co.* v. *Louisville & Nashville R. R. Co.*, 40 I. C. C. 146; *LaCrosse Shippers' Assn.* v. *C. I. & L. Ry. Co.*, 43 I. C. C. 520; *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 53 I. C. C. 729; *Illinois Brick Co.* v. *Director General* (1920), 57 I. C. C. 320, 323.

Counsel insist that under § 4 it was unlawful to charge compensation above the published Pecos rate for the

transportation from Roswell to Walla Walla. Therefore, the published Roswell rate being unlawful, non-existent indeed, the Pecos rate became the only one in force. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 322, 323, is relied upon; and it is said that the opinion there interprets the long and short haul clause as "absolutely prohibiting the existence" of higher rates for shorter hauls unless approved by the Commission. Read with the real issue in mind, the opinion gives no support to respondent's argument. The Interstate Commerce Commission held that certain reshipping privileges granted to Nashville but refused to Atlanta amounted to unreasonable preference under § 3 and ordered the carrier to discontinue them. The Commerce Court restrained the enforcement of this order. This Court declared that the challenged privileges were prohibited by the long and short haul clause; that § 4 controlled the right to grant them; that they had not been authorized by the Commission; and therefore it would be unlawful to continue them. Accordingly, the order to desist was approved and the decree of the Commerce Court reversed. No disagreement with *Pennsylvania R. R. Co.* v. *International Coal Co.* was suggested. The Court said—

(322-3) "The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of § 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to § 4 by the Act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine

the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases*, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by § 4 of the act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The opinion does not discuss the carrier's liability to shippers who had paid higher rates for the shorter hauls. No doubt similar relief would have been granted by the Commission if the situation here revealed had been brought before it.

Respondent has not asked an injunction against illegal rates. It seeks to secure something for itself without proof of pecuniary loss consequent upon the unlawful act. A similar effort failed in *Pennsylvania R. R. Co.* v. *International Coal Co., supra.* The International Company shipped 40,000 tons of coal from the Clearfield district, paying full schedule rates. The carrier had allowed other shippers from and to the same places at the same time rebates ranging from five to thirty-five cents per ton. Without alleging or proving pecuniary injury re-

sulting to itself from this unlawful action, the Company sought to recover like concessions upon all its shipments. Through Mr. Justice Lamar, this Court said—

(196–7) "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. . . . The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

(200) "Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons* v. *Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8), 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the Act of June 18, 1910 (36 Stat. 539, c. 309),

provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82."

(200) "It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate."

(200–1) "We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination."

(201–2) "*Union Pacific R. R.* v. *Goodridge*, 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate.

Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. *Denaby* v. *Manchester Ry.*, L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."

(202–3) "Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned, the plaintiff or any other shipper. But, under § 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered.

Whatever they were they could be recovered, because § 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be '*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with reasonable attorney's fee.*'"

(206) "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid."

Southern Pacific Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531, presents no conflict with *Pennsylvania R. R.* v. *International Coal Co.* There the shipper paid a published rate which the Commission afterwards found to be unrea-

sonable. This Court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable. The opinion went no further. Certainly it did not suggest that the unreasonable rate was non-existent for any purpose because forbidden by law.

Section 6 of the Commerce Act directs—

"(1) That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . (3) No change shall be made in the rates, fares, and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission. . . . *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified. . . . (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion

of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

"Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 10 (1). That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done or not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to

exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

What liability did the carrier incur by publishing a rate from Pecos lower than the scheduled one from Roswell without the Commission's permission, and thereafter imposing and collecting the higher rate upon the shipment to Walla Walla?

Construing the words of § 4 literally, it is argued that unless some property moved over the longer distance at the lower rate before greater compensation was charged for transporting like property over a shorter one, there was no violation of law. We cannot accept this view. It does not accord proper weight to imperative requirements concerning publication of rates and subsequent observance of them. The Commission holds, for example, that although the schedule contains a plain clerical error, nevertheless no other charge may be demanded and the shipper may recover any excess. *Lamb-Fish Lumber Co.* v. *Y. & M. V. R. R. Co.,* 42 I. C. C. 470.

The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission and, *prima facie* at least, incurred the penalties of § 10. Also, it became "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of . . . such violation," together with reasonable counsel fees, as provided by § 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the

lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either.

With special knowledge of rate schedules and relying on *Pennsylvania R. R. Co.* v. *International Coal Co.*, the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the Fourth Section. The rule is firmly established. Congress has not shown disapproval. The Transportation Act, 1920, with evident purpose to conserve the carriers' revenues, added the following to the proviso which gives power to exempt from the long and short haul clause: "But in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." The rule adopted by the Commission follows the logic of the opinion relied upon and can be readily applied. The contrary view would not harmonize with other provisions of the act; and, put into practice, would produce unfortunate consequences.

The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in *United States* v. *Louisville & Nashville R. R. Co., supra;* but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

If a lower rate published without authority becomes the maximum which may be charged from any inter-

mediate point, mistakes in schedules (and they are inevitable) may become disastrous. Suppose the rate from an obscure point in Maine to San Francisco via Boston, New York and Chicago should be printed at $15.00, instead of $150, and the error remain undiscovered for many months, could all who had paid more than $15.00 for passage along that route recover the excess without proof of pecuniary loss?

After the challenged judgments were entered, *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133, was decided. We adhere to the ruling there announced, and in view of it defenses in these causes based upon prescribed limitations must be determined.

The judgments below are reversed. The causes will be remanded with appropriate instructions for further proceedings.

Reversed.

MR. JUSTICE BRANDEIS dissents.